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### Meat Processing Workers and the COVID-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and a Path Forward

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**MEAT PROCESSING WORKERS AND THE COVID-19 PANDEMIC:  
THE SUBROGATION OF PEOPLE, PUBLIC HEALTH, AND ETHICS  
TO PROFITS AND A PATH FORWARD**

KELLY K. DINEEN\*

ABSTRACT

*The COVID-19 pandemic has highlighted and exacerbated existing health injustices. People who are Latino/Latinx, Black, Indigenous or members of other minority groups have disproportionately paid with their very lives. The pandemic has also exposed the complex interdependence of worker health and well-being, community health, and economic security. Industries like meat processing facilities—with congregate and high-density workplaces staffed by workers who are already disadvantaged by structural discrimination—must reckon with decades of subrogation and exploitation of workers. During this pandemic, the industry has pushed that exploitation to a point of no return. Policies to protect workers need a reset to an orientation of solidarity, mutual respect, justice, and equity. It is time for the industry that has so often profited at the expense of worker safety to sacrifice their fair share. The ethical underpinnings here are applicable to other workers’ who have been relegated to the sidelines in other essential industries, such as agriculture, retail and public service, and long-term care. Making ethical decisions about workplace protections should account for those heightened risks and existing disadvantages and legal intervention may be necessary to reinforce ethical minimums.*

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## I. INTRODUCTION

Work is a complex component of health equity;<sup>1</sup> a failure of legal and policy protections in the United States has left some workers with little choice but to risk their health to pay for food and shelter. In April 2020, workers in beef, pork, and poultry processing plants (collectively “meat processing plants”) across the South and Midwest fell ill from workplace spread of SARS-CoV-19, the virus that causes COVID-19.<sup>2</sup> Several large plants were shut down by local health departments in an effort to slow disease transmission, causing production delays and economic loss to segments of the industry.<sup>3</sup> On April 28, 2020, after considerable pressure from the meat processing industry,<sup>4</sup> then-President Trump signed an executive order that declared meat a critical and strategic material under the Defense Production Act (DPA).<sup>5</sup> Although limited in its scope, the order was widely interpreted as requiring meat processing facilities to reopen

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1. See, e.g., Emily Quinn Ahonen et al., *Work as an Inclusive Part of Population Health Inequities Research and Prevention*, 108 AM. J. PUB. HEALTH 306, 306–07 (2018) (describing the need to more explicitly consider work and workplace conditions when evaluating population health).

2. Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States, April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 557, 557 (2020). See *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last visited Oct. 4, 2020).

3. See, e.g., Michael Grabell et al., *E-mails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020, 2:04 PM), <https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants> (describing the regulatory gaps in oversight, conflicts with local health departments, and industry failures to plan for such a pandemic or implement recommended infection prevention and control strategies within the plants); Sarah Freisstat, *Concerns Were Raised Multiple Times About COVID-19 and Smithfield Foods’ St. Charles Plant Before the Health Department Shut It Down, Records Show*, AURORA BEACON NEWS (July 16, 2020), <https://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-abn-smithfield-foods-covid-19-complaints-st-20200716-juh215rmgfeqjuxgqdozqtzci-story.html>.

4. Sky Chadde et al., *A Week Before Trump’s Order Protecting Meat Plants, the Industry Sent Draft Language to Feds*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Sept. 14, 2020), <https://investigatemitwest.org/2020/09/14/a-week-before-trumps-order-protecting-meat-plants-in-dustry-sent-draft-language-to-feds/> (describing how trade industry groups for the meatpacking industry sent executive order drafts to the White House and urged the USDA to pressure local health departments to reopen plants and resist further shutdowns).

5. Exec. Order No. 13917, 85 Fed. Reg. 26313, 26313–14 (May 1, 2020) (The order declared meat a critical and strategic material under the Defense Production Act and delegated authority to the Secretary of the Department of Agriculture to ensure “proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.”).

and remain operational during the pandemic, even during outbreaks.<sup>6</sup> By the time the executive order was announced, thousands of meat processing workers had fallen ill, and some had died.<sup>7</sup>

After more than six months of continued operations, a lack of mandatory reporting, and concerted efforts to hide data,<sup>8</sup> the Midwest Center for Investigative Reporting estimated that 41,000 of just under 500,000 meat processing workers contracted COVID-19 and nearly 200 died from the infection.<sup>9</sup> During the same time period, just under 20,000 of almost 1.4 million

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6. See, e.g., Andrew Restuccia & Jacob Bunge, *Trump Takes Executive Action to Keep Meat-Processing Plants Open*, WALL ST. J. (Apr. 28, 2020, 10:23 PM), <https://www.wsj.com/articles/trump-to-take-executive-action-to-keep-meat-processing-plants-open-11588099443>; Katherine Faulders, *Trump Signs Executive Order to Keep Meat Processing Plants Open Under the Defense Production Act*, ABC NEWS (Apr. 28, 2020, 7:43 PM), <https://abcnews.go.com/Politics/trump-sign-executive-order-meat-processing-plants-open/story?id=70389089>. But see Exec. Order No. 13917, 85 Fed. Reg. 26313, 26313–14 (May 1, 2020); Daniel Hemel, *No, Trump Didn't Order Meat-Processing Plants to Reopen*, WASH. POST (May 4, 2020), <https://www.washingtonpost.com/outlook/2020/05/04/trump-meat-processing-order/> (describing the legal parameters of the executive order while acknowledging that the public and key stakeholders may perceive the order as requiring the plants to remain open); Dennis Aftergut, *Insight: Meat Plant Executive Order Is Not What It Seems*, BLOOMBERG L. (May 11, 2020, 3:00 AM), <https://news.bloomberglaw.com/corporate-governance/insight-meat-plant-executive-order-is-not-what-it-seems> (“Neither the Constitution nor any statute gives the president authority to compel owners to operate plants they had closed because Covid-19 was spreading death on their assembly lines.”).

7. See Dyal et al., *supra* note 2, at 558; see also Sky Chadde et al., *Cheap Chicken, Beef Came at a Cost: How American Meat Plants Bred Coronavirus Hot Spots*, USA TODAY (May 22, 2020, 8:42 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/05/21/coronavirus-american-chicken-beef-industry-vulnerable-despite-trump/3107636001/>.

8. See, e.g., Peter Whoriskey, *Infection Rates Were Climbing at Nebraska Meatpacking Plants. Then Health Officials Stopped Reporting the Numbers*, WASH. POST (May 12, 2020), <https://www.washingtonpost.com/business/2020/05/12/nebraska-coronavirus-case-numbers-meatpacking/> (describing the Nebraska governor’s decision to stop publicly reporting numbers of cases tied to meat processing plants); Lewis Kendall, *Revealed: Covid-19 Outbreaks at Meat-Processing Plants in US Being Kept Quiet*, THE GUARDIAN (July 1, 2020, 5:00 PM), <https://www.theguardian.com/environment/2020/jul/01/revealed-covid-19-outbreaks-meat-processing-plants-north-carolina> (describing the withholding of data on COVID-19 outbreaks tied to meat processing plants in North Carolina); Michael Corkery et al., *As Meatpacking Plants Reopen, Data About Worker Illness Remains Elusive*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/business/coronavirus-meatpacking-plants-cases.html>.

9. Sky Chadde, *Tracking Covid-19’s Impact on Meatpacking Workers and Industry*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Oct. 23, 2020), <https://investigatmidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/> [hereinafter *Tracking Covid-19’s Impact*] (“As of Oct. 2, there have been at least 41,000 reported positive cases tied to meatpacking facilities in at least 455 plants in 40 states, and at least 196 reported worker deaths in at least 51 plants in 27 states.”). See also Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887, 889 (2020) (reporting rates of COVID-19 infection in April and May among meat processing workers at nearly 17,000 with 86 deaths). The numbers are more alarming when combined with other food processing and farm workers. See Leah

Amazon employees contracted COVID-19—a fact that justifiably received widespread media attention.<sup>10</sup> Nonetheless, the meat processing industry had more than double the number of worker infections while having one-third of the total workforce.<sup>11</sup> Yet, as of this writing, many plants have failed to fully adopt infection prevention and control (IPC) recommendations,<sup>12</sup> and only two plants have been sanctioned (with de minimis fines) by the Occupational Safety and Health Administration (OSHA) for failing to protect their workers from COVID-19.<sup>13</sup>

The impact of these outbreaks is especially significant where state and local economies depend on the meat processing and agricultural industries. My home state of Nebraska is illustrative. Two-thirds of Nebraska's meat processing workers are immigrants, and those without legal authority to work in the United States may make up the majority of workers in some Nebraska plants.<sup>14</sup> Nebraska has the highest number of cases tied to meat processing plants in the

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Douglas, *Tracking COVID-19 Outbreaks in the Food System*, FOOD & ENV'T REPORTING NETWORK (Oct. 27, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> (“According to data collected by FERN, as of [Oct.] 7 at 12pm ET, at least 865 meatpacking and food processing plants (506 meatpacking and 359 food processing) and 138 farms and production facilities have had confirmed cases of C[OVID]-19. At least 63,263 workers (44,633 meatpacking workers, 10,368 food processing workers, and 8259 farmworkers) have tested positive for C[OVID]-19 and at least 267 workers (213 meatpacking workers, 37 food processing workers, and 17 farmworkers) have died.”). For the total number of workers, see *infra* note 40.

10. Rachel Lerman, *Amazon Says Nearly 20,000 Employees Have Caught the Coronavirus*, WASH. POST (Oct. 1, 2020), <https://www.washingtonpost.com/technology/2020/10/01/amazon-workers-covid-positive/>. There is reason to question Amazon's treatment of workers. See *generally* Complaint, *Smalls v. Amazon, Inc.*, No. 1:20-cv-05492 (E.D.N.Y. Nov 12, 2020).

11. See *infra* note 40.

12. See, e.g., Waltenberg et al., *supra* note 9, at 890 (showing in Table 2 the percentage of employers that responded that adopted recommendations).

13. *Press Release: U.S. Department of Labor Cites Smithfield Packaged Meats Corp. for Failing to Protect Employees from Coronavirus*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020> (fining Smithfield Packaging a penalty of \$13,494 for failing to protect workers after nearly 1300 workers were infected and 4 died); *Press Release: U.S. Department of Labor Cites JBS Foods Inc. for Failing to Protect Employees from Exposure to the Coronavirus*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 11, 2020), <https://www.osha.gov/news/newsreleases/region8/09112020> (fining JBS \$15,615 for failing to protect workers) [hereinafter *DOL Cites JBS Foods Inc.*].

14. See Associated Press, *Nonprofit Estimates Two-Thirds of Nebraska Meatpackers Are Immigrants; Worker Shortage Looms in Industry*, OMAHA WORLD HERALD (May 26, 2020), [https://omaha.com/business/nonprofit-estimates-two-thirds-of-nebraska-meatpackers-are-immigrants-worker-shortage-looms-in-industry/article\\_29eb8b90-1dba-5384-950a-86abfac57119.html](https://omaha.com/business/nonprofit-estimates-two-thirds-of-nebraska-meatpackers-are-immigrants-worker-shortage-looms-in-industry/article_29eb8b90-1dba-5384-950a-86abfac57119.html) (“Immigrants make up nearly 40% of the industry's roughly 470,000 workers, with higher concentrations in states such as South Dakota, where they are 58% of workers, and Nebraska, where they're 66%, according to the nonprofit Migration Policy Institute. Estimates on illegal immigrants vary from 14% to the majority at some plants.”).

United States,<sup>15</sup> with one in five cases at one point.<sup>16</sup> In fact, out of a total of ninety-three counties in Nebraska, those with a large meat processing presence occupy eight out of the top twelve counties with the highest number of cases per 100,000 residents.<sup>17</sup> In late April 2020, three rural Nebraska counties with large meat packing plants averaged 77 cases per 10,000 people, compared to the 5 per 10,000 people across the rest of Nebraska.<sup>18</sup> One Tyson plant in Dakota City, Nebraska—a town with a population under 2000 people—had 786 cases and 3 deaths,<sup>19</sup> and cases in that county are spiking again as of this writing.<sup>20</sup>

15. *Tracking Covid-19's Impact*, *supra* note 9 (stating the number, as of Oct. 2, as 5267, up from 4800 reported cases tied to meat packing in Nebraska on Sept. 25.). Of note, many residents of the Omaha area actually work in meat processing facilities in Iowa which have experienced outbreaks and therefore, the impact is likely higher than reflected in these numbers when accounting for employees that live in different states than the plants in which they work. Similarly, many people who work in a large plant in Dakota City, Nebraska, actually live in Iowa. For another example in which numbers can be difficult to track because workers are often tracked by the county of their residence rather than workplace, see *Report: Utah Meatpacking Plant Had 441 Virus Cases, 1 Death*, LINCOLN J. STAR (Oct. 9, 2020), [https://journalstar.com/news/national/govt-and-politics/report-utah-meatpacking-plant-had-441-virus-cases-1-death/article\\_21b91c49-2992-5460-af69-555a29d0423a.html](https://journalstar.com/news/national/govt-and-politics/report-utah-meatpacking-plant-had-441-virus-cases-1-death/article_21b91c49-2992-5460-af69-555a29d0423a.html).

16. See Jessica Lussenhop, *Tony Vargas in Nebraska: The Human Cost of Political Inaction on Covid*, BBC NEWS (Oct. 2, 2020), <https://www.bbc.com/news/world-us-canada-54183191>.

17. When sorted by the number of cases/100,000 residents, the top twelve counties at the time of writing are Dakota (Tyson Foods and across the river from Seaboard Triumph Foods in Souix City, IA), Colfax (Cargill), Saline (Smithfield), Dawson (Tyson), Thurston, Platte, Dodge (Lincoln Processing and Wholstone), Hall (JBS), Rock, Kearney, Douglas (across river from Tyson Plant), and Madison (Tyson). *Nebraska Covid Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/nebraska-coronavirus-cases.html#countyupdated> (last updated Jan. 16, 2021, 12:27 AM) [hereinafter *Nebraska Covid Map and Case Count*]. See *Tracking Covid-19's Impact*, *supra* note 9.

18. Henry J. Cordes, *Three Meatpacking Counties Drive Nebraska's Coronavirus Numbers*, STAR HERALD (Aug. 20, 2020), [https://starherald.com/three-meatpacking-counties-drive-nebraskas-coronavirus-numbers/article\\_e6a1f607-0ea7-5f3a-b788-dace185e6d66.html](https://starherald.com/three-meatpacking-counties-drive-nebraskas-coronavirus-numbers/article_e6a1f607-0ea7-5f3a-b788-dace185e6d66.html). See *Coronavirus Cases Spike in Northeast Nebraska's Dakota County*, LIVE WELL NEB.: SIOUX CITY J. (Apr. 24, 2020), [https://omaha.com/livewellnebraska/health/coronavirus-cases-spike-in-northeast-nebraskas-dakota-county/article\\_31b7ed18-9de5-5144-a859-c40c27139a10.html](https://omaha.com/livewellnebraska/health/coronavirus-cases-spike-in-northeast-nebraskas-dakota-county/article_31b7ed18-9de5-5144-a859-c40c27139a10.html). Of course, that number now seems de minimus by comparison as the Nebraska rates overall are in the hundreds to thousands per 100,000 in Nebraska. See *Nebraska Covid Map and Case Count*, *supra* note 17.

19. Douglas, *supra* note 9; *Search of Dakota City, Nebraska*, U.S. CENSUS BUREAU, <https://www.census.gov/content/census/en/search-results.html?searchtype=web&stateGeo=none&q=dakota%20city%20city%20ne&disambFipsCode=3112000> (last visited Oct. 30, 2020) (showing a 2019 population estimate of 1,859 people for Dakota City).

20. Dakota County has a large Tyson plant and is also directly across the river from Seaboard Triumph Seafood in Sioux City, Iowa, which also has had outbreaks. *Compare Tyson Fresh Meats in Dakota City, NE*, GOOGLE MAPS, <http://maps.google.com> (search for “Tyson Fresh Meats Dakota County” and select the location at 1671 – 1671 Ibp Ave.), *with Seaboard Triumph Seafood in Sioux City, IA*, GOOGLE MAPS, <http://maps.google.com> (search for “Seaboard Triumph Seafood Sioux City” and select the location at 5555 Seaboard Triumph Pkwy.). On October 17, Dakota County had a daily case average of 484/100,000 over the last seven days and an overall infection

The meat processing plant outbreaks have contributed to economic harms to related industries;<sup>21</sup> they have also disproportionately harmed individuals who have already endured centuries of structural discrimination.<sup>22</sup> The disparate infection rates among those who identify as Hispanic or Latino/Latinx in Nebraska are significant.<sup>23</sup> In late May 2020, individuals in these ethnic and racial groups accounted for 48% of COVID-19 cases,<sup>24</sup> while making up only 11.4% of Nebraska's population.<sup>25</sup>

And yet the plants have not universally adopted IPC recommendations.<sup>26</sup> At one unnamed plant in Nebraska, thirty-one percent of tested workers were positive for COVID-19 (many of them asymptomatic), with a full third of positive employees reporting close contact with a visibly ill employee at work well *after* workplace protections should have excluded sick workers from the facility.<sup>27</sup> In July 2020, attempts to address the industry's incomplete adoption of IPC measures through state legislation failed to garner the necessary support

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rate of 12,269/100,000 residents, meaning roughly twelve percent of the population had tested positive for the infection. This overall infection rate was the highest in the State by far, with the second highest rate at 7,965/100,000 in Colfax, home to a Cargill plant. Nebraska as a whole had an overall infection rate of 2,932/100,000, with a daily case average of 338/100,000 over the last seven days. *Nebraska Covid Map and Case Count*, supra note 17. On October 4, 2020, Nebraska was number seven among all U.S. states in new cases per 100,000 residents with a daily case average of 197/100,000 over the last seven days, and showing Dakota County as having a daily case average of 399/100,000 over the last seven days. *Id.*

21. Kenneth Ferreira, *Editorial, 10/4: COVID-19 Still Wreaking Havoc on Nebraska's Farm Economy*, LINCOLN J. STAR (Oct. 3, 2020), [https://journalstar.com/opinion/editorial/editorial-10-4-covid-19-still-wreaking-havoc-on-nebraskas-farm-economy/article\\_535733eb-84e3-5544-a238-a25ef5a3b987.html](https://journalstar.com/opinion/editorial/editorial-10-4-covid-19-still-wreaking-havoc-on-nebraskas-farm-economy/article_535733eb-84e3-5544-a238-a25ef5a3b987.html) (reporting that Nebraska agriculture could experience over \$3 billion in losses after spring outbreaks caused meat-processing facilities to operate at fifty to seventy percent capacity, causing losses to beef, corn, and soybean producers).

22. Ruqaiyah Yearby & Seema Mohapatra, *Structural Discrimination in COVID-19 Workplace Protections*, HEALTH AFFS. (May 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full/> [hereinafter *Structural Discrimination*].

23. NEB. DEP'T OF HEALTH & HUM. SERVS., NEBRASKA COVID-19 CASE SUMMARY BY RACE AND ETHNICITY CATEGORIES 1 (2020).

24. *Id.*

25. *Nebraska Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/NE> (last visited Oct. 30, 2020).

26. Waltenburg et al., supra note 9, at 890 tbl.2 (showing none of the interventions were adopted universally across all the facilities that responded).

27. Matthew Donahue et al., *Notes from the Field: Characteristics of Meat Processing Facility Workers with Confirmed SARS-CoV-2 Infection — Nebraska, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1020, 1020 (2020) (reporting that only forty-one percent of workers recalled having symptoms screened before entering the workplace). Other research with meat processing workers, including workers from Nebraska, indicates the industry only inconsistently adopted recommendations and that workers do not feel that their health matters to their supervisors. See Athena Ramos, *Concerns and Perceptions of COVID-19 Among Meatpacking Plant Workers*, UNIV. OF NEB. MED. CTR., [https://tools.niehs.nih.gov/wetp/public/hasl\\_get\\_blob.cfm?ID=12211](https://tools.niehs.nih.gov/wetp/public/hasl_get_blob.cfm?ID=12211) (last visited Jan. 7, 2021).

in the Nebraska unicameral.<sup>28</sup> Further, between September 25 and October 2, 2020, the number of cases in Nebraska tied to meat packing plants increased by almost ten percent,<sup>29</sup> indicating a possible failure by plants to reasonably protect workers. Today, meat processing workers in Nebraska and other states are left with a terrible choice between their health and their livelihood.

Even in non-pandemic times, most of the meat processing workforce is disenfranchised.<sup>30</sup> Immigrants and refugees from numerous countries work in the plants and many lack legal authority to work in the United States.<sup>31</sup> These workers face compound disadvantage by virtue of their race, ethnicity, limited English proficiency, and socioeconomic status.<sup>32</sup> According to the Centers for Disease Control and Prevention (CDC), nearly ninety percent of meat processing workers who contracted COVID-19 in April and May of 2020 are members of racial or ethnic minority groups.<sup>33</sup> In sum, these workers are already marginalized by structural discrimination<sup>34</sup> and are further disempowered by spotty labor union involvement in the workplace, fears of immigration enforcement, and the coercive power of food and housing insecurity coupled with few alternatives to meat processing work.<sup>35</sup> While the meat processing industry itself has been deemed essential, the people who work in the industry are too often treated as though they are invisible and expendable.<sup>36</sup>

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28. *Nebraska Lawmakers Reject Push for Meatpacking Restrictions*, 10 11 NOW (July 29, 2020, 3:02 PM), <https://www.1011now.com/2020/07/29/nebraska-lawmakers-reject-push-for-meatpacking-restrictions/>; Unicameral AM3238, 106th Leg., 2d Reg. Sess. (Neb. 2020) (requiring COVID-19 related infection prevention and control measures, paid leave, and data collection and reporting by large meat processing plants).

29. There has also been a 9.7% increase in cases in nine days between September 25 and October 2, when the numbers went from 4800 cases tied to meat processing to 5267 cases. *See Tracking Covid-19's Impact*, *supra* note 9.

30. Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, J.L. & BIOSCIENCES, Jan.–June 2020, at 1, 5 [hereinafter *Structural Racism*].

31. Michael Haedicke, *To Understand the Danger of COVID-19 Outbreaks in Meatpacking Plants, Look at the Industry's History*, THE CONVERSATION (May 6, 2020, 8:22 AM), <https://theconversation.com/to-understand-the-danger-of-covid-19-outbreaks-in-meatpacking-plants-look-at-the-industrys-history-137367>.

32. *Id.*

33. Waltenberg et al., *supra* note 9, at 887 (reporting that among 9,919 cases in twenty-one states with reported race/ethnicity, eighty-seven percent occurred among racial and ethnic minority workers).

34. *Structural Racism*, *supra* note 30, at 7. *See also Structural Discrimination*, *supra* note 22 (discussing the inequitable impact of COVID-19 on many essential workers and the lack of protections due to long-standing structural discrimination). *See generally* Waltenberg et al., *supra* note 9 (highlighting the inconsistent and limited nature of protections provided by employers).

35. HUM. RTS. WATCH, BLOOD, SWEAT AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS, 1, 75, 77 (2004).

36. *See, e.g.*, Athena K. Ramos et al., *Invisible No More: The Impact of COVID-19 on Essential Food Production Workers*, 25 J. AGROMEDICINE 378, 378–79 (2020) (highlighting how essential workers in the food industry often have little visibility or voice).



This Article expands upon previous ethics committee consultation on protecting workers in meat processing plants.<sup>37</sup> Part II describes the nature of the meat processing industry, the workplace, and common characteristics of the people that work in the plants. Part III discusses the existing legal protections as well as the ethical foundations of worker protections during a public health crisis. Part IV describes a framework for worker protection grounded in those ethical principles with recommendations for government actors, industry leaders, and worker communities.

## II. THE MEAT PROCESSING INDUSTRY, THE WORKERS, AND THE WORKPLACE

Meat processing is a multi-billion-dollar industry.<sup>38</sup> In the United States alone, there are approximately 3500 poultry, pork, and beef slaughtering and processing facilities.<sup>39</sup> The industry employs close to half a million workers—over sixty percent of them are involved in labor intensive production work of slaughtering, evisceration, cutting and deboning, packing and processing, and sanitizing.<sup>40</sup> Over the last several decades, the industry has moved many of their

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37. I am a member of the University of Nebraska Medical Center's Global Center for Health Security Ethics Advisory Committee. *Ethics Advisory Committee Members*, GLOB. CTR. FOR HEALTH SEC., <https://www.unmc.edu/healthsecurity/ethics/committee.html> (last visited Oct. 30, 2020). For the ethics report on this issue, see ABIGAIL E. LOWE, ET AL., GLOB. CTR. FOR HEALTH SEC., UNIV. OF NEB. MED. CTR., *ETHICAL CONSIDERATIONS REGARDING MEAT PROCESSING PLANT OPERATIONS, WORKER SAFETY, AND COMMUNITY WELFARE* (2020).

38. Michelle Perrett, *JBS Sees Growth in Revenue and Profits*, FOOD NAVIGATOR-USA (Apr. 1, 2019, 11:52 AM), <https://www.foodnavigator-usa.com/Article/2019/04/01/JBS-sees-growth-in-revenue-and-profits#> (reporting tens of billions of dollars in net revenue for JBS, a Brazilian-based meat processing giant). Prior to 2020, there was little indication the industry was suffering financially, with billions in revenue and a positive forecast from the USDA. See, e.g., *Meat Market Size in the U.S. 2002–2026*, IBISWORLD, <https://www.ibisworld.com/industry-statistics/market-size/meat-markets-united-states/> (last visited Oct. 26, 2020) (describing about \$7.4 billion in revenue and steady industry growth in 2019). For an overall picture of the agriculture and food industry's \$1.109 trillion contribution to the United States' 2019 GDP, see *Ag and Food Sectors and the Economy*, ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> (last updated Dec. 16, 2020).

39. *Explore Census Data*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/> (2018) (search “3116 animal slaughtering and processing”; select “All Sectors: County Business Patterns by Legal Form of Organization and Employment Size Class for U.S., States, and Selected Geographies: 2018”).

40. Those in the occupational code of production occupations (51-000) make up sixty-one percent of the total workforce of animal slaughtering and processing workers. See *Occupational Employment Statistics*, U.S. BUREAU OF LAB. STAT. (Mar. 31, 2020), [https://www.bls.gov/oes/current/naics4\\_311600.htm](https://www.bls.gov/oes/current/naics4_311600.htm) [hereinafter *Employment Statistics*]. For a description of the work done in each phase of processing, see, for example, MATT MCCONNELL, HUM. RTS. WATCH, “WHEN WE’RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING”: WORKERS’ RIGHTS UNDER THREAT IN U.S. MEAT AND POULTRY PLANTS 17 (2019).

plants to rural areas, leaving behind the urban, unionized workforce.<sup>41</sup> Similar to other sectors, the industry has consolidated into the hands of a few multinational corporations with ample resources.<sup>42</sup>

*A. Disempowered Workers, Structural Discrimination, and Health Injustice*

Meat processing workers were treated as fungible long before the pandemic.<sup>43</sup> During the pandemic, workplace culture and practices compromised workers' safety and created serious risks of COVID-19 infection,<sup>44</sup> as well as more severe illness for workers already disadvantaged by structural and institutional discrimination.<sup>45</sup> The people who work in meat processing plants must work to eat and live and must assume infection risks in order to work.<sup>46</sup> Those risks are heightened by pressure from federal, state, and industry powers to keep plants operating, even in the midst of outbreaks.<sup>47</sup>

Adding to the multidirectional pressures on workers is the intersection of race and ethnicity with immigrant or refugee status of the workforce,<sup>48</sup> with up to a quarter of the workers lacking legal authorization to work in the United States.<sup>49</sup> This power imbalance that leaves workers with no options and fearful of being reported is no accident. Instead, the industry has increasingly relied on, and even recruited, immigrants who have less power to assert their rights to

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41. *E.g.*, Sapna Jain, *Can We Keep Meatpacking Companies Accountable for Hiring Undocumented Immigrants?*, 3 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 157, 159 (2016).

42. *E.g.*, Haedicke, *supra* note 31. *See also* MCCONNELL, *supra* note 40, at 22.

43. *See, e.g.*, MCCONNELL, *supra* note 40, at 14 (discussing companies' dismissal of long-time workers in favor of cheaper, non-unionized immigrant workers).

44. *See, e.g.*, Ramos, *supra* note 27, (describing workers' statements that managers pressured them to circumvent COVID-19 screenings, come to work if sick, and return to work before the two-week isolation period's end).

45. "Institutional racism operates through 'neutral' organizational practices and policies that limit racial and ethnic minorities equal access to opportunity," while structural discrimination operates through laws that are written or enforced to advantage the majority and disadvantage "racial and ethnic minorities in access to opportunity and resources." *Structural Racism*, *supra* note 30, at 5.

46. For a discussion of the ways in which blue collar and other essential workers are forced to work under risky conditions, see *id.* at 8–9.

47. *See* discussion *infra* Section II.C, Part III.

48. *E.g.*, MCCONNELL, *supra* note 40, at 15.

49. *See, e.g., id.* at 19 (discussing an estimate that nearly one in four workers in the industry is undocumented); *see also*, Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1771 (1993) ("[Undocumented workers are] starkly unprotected and excluded on most fronts from the norms of aboveground employment relationships. Such employees often lack even the most rudimentary understanding of their legal rights, are vulnerable to exploitation, and are all but invisible to most of the citizenry.").

workplace protections.<sup>50</sup> Therefore, those who have little option but to work through serious and deadly health risks are those who already experience significant health inequities.<sup>51</sup> The COVID-19 pandemic has exacerbated these existing health injustices, with a disproportionate number of infections and severe illnesses among immigrants and racial and ethnic minorities.<sup>52</sup>

Additionally, meat processing workers are also more likely to experience health inequities based on income and locality.<sup>53</sup> They are more likely to live in rural areas and to live at or near the federal poverty line,<sup>54</sup> making personal food and housing insecurity more likely. According to one worker,

[O]thers are fearful due to their immigration status and the majority are scared that they won't be able to pay their bills or lose their job. There are people in the plant who do not know how to read or write, older people, and that makes it more difficult to apply for help because they don't know how to write and much less speak English, but the common denominator is they are scared to be without a job and pay their bills so they go to work sick.<sup>55</sup>

A lack of access to health care is also a reality—many are uninsured, underinsured, or may avoid health care settings for fear of immigration

50. *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183, at \*1–2 (D. Md. Sept. 16, 2020) (“Hourly wages for poultry processors are low, and the work is grueling and often dangerous. The poultry processing industry relies upon entry-level employees from vulnerable populations, including migrant workers, refugees, asylum-seekers, and prison laborers.”) (citation omitted). *See, e.g., Jain, supra* note 41, at 159–60 (discussing an influx of disadvantaged, non-unionized immigrants towards the meatpacking and poultry industry).

51. *See Samantha Artiga & Matthew Rae, The COVID-19 Outbreak and Food Production Workers: Who Is At Risk?*, KAISER FAM. FOUND. (June 3, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-covid-19-outbreak-and-food-production-workers-who-is-at-risk/> (describing the demographics and social characteristics of food processing workers and the risks of the pandemic).

52. *See, e.g., David P. Bui et al., Racial and Ethnic Disparities Among COVID-19 Cases in Workplace Outbreaks by Industry Sector—Utah, March 6–June 5, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1133, 1133 (2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6933e3.htm?s\\_cid=mm6933e3\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6933e3.htm?s_cid=mm6933e3_w) (“Although 24% of Utah’s workforce in all 15 affected sectors identified as Hispanic or Latino/Latinx (Hispanic) or a race other than non-Hispanic white (nonwhite), 73% . . . of workplace outbreak-associated COVID-19 cases were in persons who identified as Hispanic or nonwhite.”) (citation omitted); *see also Anya Jabour, Immigrant Workers Have Borne the Brunt of Covid-19 Outbreaks at Meatpacking Plants*, WASH. POST (May 22, 2020, 6:11 AM), <https://www.washingtonpost.com/outlook/2020/05/22/immigrant-workers-have-borne-brunt-covid-19-outbreaks-meatpacking-plants/> (highlighting how meatpacking facilities, which are mostly staffed by immigrant workers, have become major centers of COVID-19 outbreaks).

53. Artiga & Rae, *supra* note 51.

54. *See Jien*, 2020 WL 5544183, at \*10 (describing annual wages for a full-time poultry plant worker at less than \$25,000). The federal poverty line for a family of four is \$26,200; *Poverty Guidelines*, ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., (Jan. 15, 2020), <https://aspe.hhs.gov/poverty-guidelines>.

55. Ramos, *supra* note 27.

enforcement.<sup>56</sup> Workers often share transportation to and from the workplace, live in multi-generational or other congregate housing, and have frequent community contact with fellow workers.<sup>57</sup> These factors make social distancing, quarantine, and isolation particularly difficult. Overall, structural discrimination and subrogation based on race, ethnicity, immigration status, geography, and socioeconomic status continues to harm the most marginalized among us, including meat processing workers, who have suffered inordinate harms during the pandemic.<sup>58</sup> Without serious commitments to protecting these workers, the industry may continue to face outbreaks (and remain unprepared for future outbreaks) while workers continue to confront a deadly virus on top of existing health, economic, and racial injustices.

### B. *The Dangers of the Meat Processing Workplace*

Even outside the context of COVID-19, meat processing work comes with numerous potential health harms—the work is physically demanding and dangerous, usually involving standing all day in cold, crowded plants and performing the same action over and over, such as deboning or cutting meat with knives or saws.<sup>59</sup> Work-place injury rates are high, despite under-reporting,<sup>60</sup>

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56. *Id.* See also, NAT'L IMMIGR. L. CTR., HEALTH CARE PROVIDERS AND IMMIGRATION ENFORCEMENT: KNOW YOUR RIGHTS, KNOW YOUR PATIENTS' RIGHTS I (Apr. 17, 2017) (“The threat of increased federal immigration enforcement has raised concerns among immigrant families, some of whom may decide to forego necessary medical services out of fear that they could be putting themselves and their family members at risk.”).

57. See, e.g., Waltenburg, et al., *supra* note 9, at 887.

58. See, e.g., Neeta Kantamneni, *The Impact of the COVID-19 Pandemic on Marginalized Populations in the United States: A Research Agenda*, J. VOCATIONAL BEHAV., June 2020, at 103439 (providing an overview of the ways in which workforce inequities intersect with inequities based on race, ethnicity, and wealth to create significant injustice during COVID-19).

59. See, e.g., Berry J. van Holland et al., *Preventive Occupational Health Interventions in the Meat Processing Industry in Upper-Middle and High-Income Countries: A Systematic Review on Their Effectiveness*, 88 INT'L ARCHIVES OCCUPATIONAL & ENV'T HEALTH 389, 390 (2015). (“[S]laughterers and meat packers have to stand the majority of their workday. They typically work on an assembly line performing one specific function, although they may rotate duties during and between workdays. Strenuous activities are performed, floors are often slippery, and workers are exposed to animal waste... work is performed near dangerous equipment, such as knives and saws. Slaughtering and deboning call for specific skills to be executed repeatedly, precisely and fast. Pork shoulder deboners execute almost 50 cuts and saws during one deboning operation. . . . If knives are not optimally sharp, higher force applications are necessary, leading to more operator exertion and increased risk for upper extremity [musculoskeletal disorders] . . . . [E]mployees may be exposed to airborne substances. For instance, one study showed a prevalence of 5.6% of Methicillin-Resistant Staphylococcus Aureus (MRSA) in slaughterhouse workers when live pigs were involved. . . . There is also evidence of zoonotic influenza among poultry and swine workers.” (internal citations omitted)).

60. See, e.g., Kathleen M. Fagan & Michael J. Hodgson, *Under-Recording of Work-Related Injuries and Illnesses: An OSHA Priority*, 60 J. SAFETY RSCH. 79, 81 (2016) (“OSHA... found many workers from the debone line [in a poultry plant] who were seen for musculoskeletal

and include musculoskeletal, neurological, hearing, and traumatic injuries, as well as infectious diseases.<sup>61</sup> According to a 2019 Human Rights Watch report,

These workers have some of the highest rates of occupational injury and illness in the United States. They labor in environments full of potentially life-threatening dangers. Moving machine parts can cause traumatic injuries by crushing, amputating, burning, and slicing. The tools of the trade—knives, hooks, scissors, and saws, among others—can cut, stab, and infect. The cumulative trauma of repeating the same, forceful motions, tens of thousands of times each day can cause severe and disabling injuries. Together, [meat] processing companies reported more severe injuries to [OSHA] than many industries that are popularly recognized as hazardous, such as sawmills, industrial building construction, and oil and gas well drilling.<sup>62</sup>

In addition, the processing lines are allowed to run at high speeds (called line speeds) by virtue of several years of industry-friendly administrative actions, such as “line speed waivers.”<sup>63</sup> Higher line speeds increase production

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symptoms and never referred to a physician. Their injuries were never recorded on the recordkeeping log. Worker interviews revealed that some workers stopped going to the nursing station because the treatments were not helping. Some continued to have symptoms that were left untreated. Others went to their own doctors but did not report the injury to their employer for fear of reprisal. Some workers transferred to jobs that allowed their symptoms to resolve.”); Jessica H. Leibler & Melissa J. Perry, *Self-Reported Occupational Injuries Among Industrial Beef Slaughterhouse Workers in the Midwestern United States*, 14 J. OCCUPATIONAL & ENV'T HYGIENE 23, 27 (2017) (finding self-reported rates of injury were nearly double those that were officially reported by the industry).

61. Leibler & Perry, *supra* note 60, at 23. See also van Holland et al., *supra* note 59, at 390; Thomas A. Arcury et al., “...You Earn Money by Suffering Pain:” Beliefs About Carpal Tunnel Syndrome Among Latino Poultry Processing Workers, 17 J. IMMIGRANT & MINORITY HEALTH 791, 791 (2015) (conducting a qualitative study of poultry plant workers with repetitive motion nerve injuries); Remington L. Nevin et al., *Association of Poultry Processing Industry Exposures with Reports of Occupational Finger Amputations*, 59 J. OCCUPATIONAL & ENV'T MED. e159, e160 (2017) (describing a high rate of finger amputations among poultry processing workers); Emilia Irzmańska & Tomasz Tokarski, *A New Method of Ergonomic Testing of Gloves Protecting Against Cuts and Stabs During Knife Use*, 61 APPLIED ERGONOMICS 102, 102 (2017) (evaluating gloves to increase safety during meat processing work because of the high rates of injury).

62. MCCONNELL, *supra* note 40, at 1–2.

63. The Food Safety Inspection Service began allowing poultry plants to increase line speeds over the 140 birds per minute for chicken, 9 C.F.R. § 381.69(a) (2020), and 55 birds per minute limit for turkey, 9 C.F.R. § 381.69(b) (2020), by granting individual requests to exceed the limits under existing regulatory authority. For an explanation of that process, see *Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken Establishments to Operate at Line Speeds of up to 175 Birds per Minute*, 83 Fed. Reg. 189, 49048, 49051 (Sept. 28, 2018). The poultry line speeds were set in 2014 after years of careful study. See *Modernization of Poultry Slaughter Inspection: Final Rule*, 79 Fed. Reg. 162, 49566, 49566 (Aug. 21, 2014) (to be codified at 9 C.F.R. pt. 381, 500). The line speeds limits for pork were eliminated altogether in 2019. See *Modernization of Swine Slaughter Inspection: Final Rule*, 84 Fed. Reg. 190, 52300, 52300 (Oct. 1, 2019) (to be codified at 9 C.F.R. pt. 301, 309, 310) (“revoking maximum

(and profits), but come at the expense of worker safety as crowded workers rush to perform their assigned duties with cold hands and sometimes with sharp tools, often as line supervisors urge them to keep up the pace.<sup>64</sup>

Workers describe workplaces in which their safety is secondary to production. According to one worker, “I do not consider the plant where I work safe. They only care about filling their production, and they do not care about the health of their workers or the risks of it.”<sup>65</sup> Others have reported an industry practice of supervisors denying access to breaks or restrooms for long stretches of the day.<sup>66</sup> Research by Ramos et al. revealed consistent narratives of dehumanization, with workers in every focus group describing “being treated like machines, animals, or something less than human.”<sup>67</sup> Workers often report that dehumanization comes directly from supervisors in a punitive and hierarchical culture, with one participant saying, “It would be good if one were treated well, like a human being, like the human beings that we are . . . when one talks to the supervisors, they don’t even respond to you or answer you.”<sup>68</sup> The workplace environment that privileged daily production goals and profits over worker safety even before the pandemic, combined with significant declines in regulatory scrutiny under the Trump administration, positions these workers for the additional harms of the COVID-19 pandemic.<sup>69</sup>

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line speeds and authorizing establishments to determine their own line speeds based on their ability to maintain process control for preventing fecal contamination and meeting microbial performance measures for carcasses during the slaughter operation”).

64. See, e.g., MCCONNELL, *supra* note 40, at 53 (quoting workers they interviewed as saying, “If it’s too fast and we’re hurting ourselves, doesn’t matter to them. They just want more and more”, “The issue is, when they’re running the line, they don’t even give us a minute sometimes. It doesn’t have to be like that—fast, fast, fast”, and “If you’re slow... the supervisors get annoyed. . . they come and intimidate [the workers]. . . . There isn’t anybody who can speak up to them—the supervisors are untouchable. No one listens to [the line workers]”).

65. Ramos, *supra* note 27. See also Athena K. Ramos, et al., “No Somos Máquinas” (*We Are Not Machines*): Worker Perspectives of Safety Culture in Meatpacking Plants in the Midwest, 64 AM. J. INDUS. MED. 84, 84–96 (2021) [hereinafter *We Are Not Machines*] (quoting a meat processing worker on the non-enforcement of safety as saying, “[W]ell, when one starts working at the plant, well, they have rules the—safety rules and all of that. Those rules aren’t enforced because they want production and they don’t care about those accidents, well, those dangerous ones that can happen.”).

66. See, e.g., MCCONNELL, *supra* note 40, at 73 (“A few workers who spoke with Human Rights Watch described coworkers wearing diapers at their workstations or urinating on themselves.”). Line and floor supervisors are coveted jobs, with earnings that on average are nearly double what front-line cutters and packers make. See *Employment Statistics*, *supra* note 40 (describing that supervisors have an average yearly income of over \$58,000 compared with the \$29,000 or less earned on average by the front-line workers).

67. *We Are Not Machines*, *supra* note 65, at 87.

68. *Id.* at 88.

69. MCCONNELL, *supra* note 40, at 4, 88–89.

### C. SARS-CoV-2 Spread in Meat Processing Plants

Meat processing plant conditions are ideal for the spread of SARS-CoV-19, which is transmitted from person to person by respiratory droplets and through the air.<sup>70</sup> To contract the infection, individuals must be exposed to the virus at a high enough dose from an infected person, which depends on a number of factors.<sup>71</sup> Density and proximity of workers, duration of exposure, ventilation patterns, air temperature, and whether or not the infected person is putting off more or less virus (e.g. talking or shouting rather than breathing normally) all impact the presence of and degree of exposure to SARS-CoV-2 and possible COVID-19 infection.<sup>72</sup>

Inside the meat processing plants, cold temperatures reduce microbial growth on the meat;<sup>73</sup> however, those lower temperatures may increase the risks of COVID-19 transmission and severity among workers.<sup>74</sup> Ventilation systems that rely on recirculated air—which are common in meat processing plants—also may facilitate the spread of SARS-CoV-2 via droplet and aerosolized

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70. The science of aerosolized transmission is incomplete and rapidly evolving. *See, e.g.*, Benjamin L. Augenbraun et al., *Assessment and Mitigation of Aerosol Airborne SARS-Cov-2 Transmission in Laboratory and Office Environments*, 17 J. OCCUPATIONAL & ENV'T HYGIENE 447, 447 (2020) (reviewing current understandings of aerosolized transmission and creating models to demonstrate risk of infection in various physical workplace environments). *See also* Matthew Meselson, *Droplets and Aerosols in the Transmission of SARS-CoV-2*, 382 NEW ENG. J. MED. 2063, 2063 (2020).

71. Mahesh Jayaweera et al., *Transmission of COVID-19 Virus by Droplets and Aerosols: A Critical Review on the Unresolved Dichotomy*, 188 ENV'T RSCH., Sept. 2020, at 109819, 2 (explaining how droplets, aerosols, and fomites carrying the virus can spread via talking, breathing, coughing, and/or sneezing).

72. For a recent and comprehensive review of COVID-19 transmission, see *id.* (reviewing the evolution of evidence, the modes of transmission, and the factors that influence risk).

73. *See, e.g.*, Megan Molteni, *Why Meatpacking Plants Have Become COVID-19 Hotspots*, WIRED (May 7, 2020, 7:00 AM), <https://www.wired.com/story/why-meatpacking-plants-have-become-covid-19-hot-spots/> (discussing the physical conditions common to meat processing facilities around the world that facilitate the spread of COVID-19); *see also Recommended Physical Standards for Meat and Poultry Slaughter and Processing Plants*, KAN. DEP'T OF AGRIC., <https://agriculture.ks.gov/docs/default-source/meat-and-poultry/recommended-physical-standards-for-meat-and-poultry-slaughter-processing-plants-.pdf?sfvrsn=0> (last visited Jan. 11, 2021).

74. The exact relationship between lower temperature and rates of COVID-19 is still being explored but there is evidence of an association, *see, e.g.*, Yueling Ma et al., *Effects of Temperature Variation and Humidity on the Death of COVID-19 in Wuhan, China*, SCI. TOTAL ENV'T, July 1, 2020, at 1, 4 (finding a negative relationship between both lower temperature and lower humidity and death rates from COVID-19). *See also* Jinjun Ran et al., *A Re-Analysis in Exploring the Association Between Temperature and COVID-19 Transmissibility: An Ecological Study with 154 Chinese Cities*, EUR. RESPIRATORY J., Aug. 27, 2020, at 1, 2 (suggesting a non-linear relationship between temperature and virus transmission). *But see* Tahira Jamil et al., *No Evidence for Temperature-Dependence of the COVID-19 Epidemic*, FRONTIERS PUB. HEALTH, Aug. 26, 2020, at 2, 5 (suggesting the virus remains transmissible at higher temperatures).

transmission modes.<sup>75</sup> Thousands of workers may be inside the plant at one time, engaged in physical labor that may cause heavier breathing.<sup>76</sup> Additionally, the shifts are long and employees work in close proximity to one another on “floors” or lines.<sup>77</sup> As one industry official explained, “[P]lants are typically designed to maximize space and efficiency . . . the meat industry is no different. Industry facilities are not designed for social distancing; that is an incontrovertible, if not inconvenient, fact.”<sup>78</sup> Without aggressive measures to alter the environment inside the plants and provide personal protective equipment to workers, they remain at high risk.

Several workplace policies also increase the risks around COVID-19. Many workers do not have paid sick leave.<sup>79</sup> Even for those that do, punitive point systems, which are ubiquitous in the industry, punish workers for sickness or on-the-job injuries, and therefore incentivize working through illness.<sup>80</sup> A work-through-sickness culture and a failure to inform workers of protections based on existing laws is all too common.<sup>81</sup> Organizational structures within plants are hierarchical, with line and floor supervisors using negative reinforcement such as point systems with the threat of termination to meet production quotas.<sup>82</sup> Even in the midst of the pandemic, many large plants continued or instituted

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75. Thomas Guenther et al., *Investigation of a Superspreading Event Preceding the Largest Meat Processing Plant-Related SARS-Coronavirus 2 Outbreak in Germany*, SSRN (July 23, 2020) (conducting a study that demonstrated meat processing temperature and ventilation systems with recirculating air that allowed for transmission of the same viral particles over an 8-meter, 26-foot radius).

76. *Id.*

77. *See, e.g.*, Waltenburg et al., *supra* note 9, at 887; Kim Krisberg, *Essential Workers Facing Higher Risks During COVID-19 Outbreak: Meat Packers, Retail Workers Sickened*, THE NATION'S HEALTH (Aug. 2020), <https://www.thenationshealth.org/content/50/6/1.1>.

78. Sarah Freishtat, *Concerns Were Raised Multiple Times About COVID-19 and Smithfield Foods' St. Charles Plant Before the Health Department Shut It Down, Records Show*, AURORA BEACON NEWS (July 16, 2020), <https://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-abn-smithfield-foods-covid-19-complaints-st-20200716-juh215rmgfeqjuxgqdozqtzci-story.html> (quoting a Smithfield plant official describing the difficulties of implementing IPC measures).

79. *See, e.g.*, JOCELYN HERSTEIN ET AL., UNIV. OF NEB. MED. CTR., MEAT PROCESSING FACILITY COVID-19 PLAYBOOK 3 (2020).

80. *See* Fagan & Hodgson, *supra* note 60, at 81.

81. *See, e.g.*, DINA BAKST ET AL., A BETTER BALANCE, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE “NO FAULT” ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) 1, 2 (2020); *see also* A Smithfield Worker, *I Work at Smithfield Foods. I'm Suing Them over Putting Our Lives at Risk for Your Dinner*, WASH. POST (Apr. 24, 2020, 8:15 PM), <https://www.washingtonpost.com/outlook/2020/04/24/smithfield-foods-lawsuit-coronavirus/>. Her case was dismissed by the district court on jurisdictional grounds, *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1233 (W.D. Mo. 2020) (granting a motion to dismiss to defendant Smithfield pursuant to primary jurisdiction doctrine).

82. BAKST ET AL., *supra* note 81, at 8–9.



attendance bonuses,<sup>83</sup> further incentivizing working despite illness, inapposite to IPC recommendations.<sup>84</sup>

Reducing the risks to workers and maintaining consistent production levels will require a fundamental culture change in the industry. For decades, the industry has prioritized production over safety.<sup>85</sup> To weather COVID-19, industry and government stakeholders will need to abandon that false dichotomy and accept that protecting workers is the only ethically acceptable way to ensure long-term production and profits. Yet, the federal and organizational responses, to date, may prove insufficient to protect workers.

### III. FAILURES OF EXISTING LEGAL PROTECTIONS AND AN APPEAL TO PUBLIC HEALTH ETHICS

Public health activities are enabled by law and should be grounded in ethics. Law provides the authority for and outlines the limitations on governmental action, and may be used to require, prohibit, incentivize, or discourage behaviors to improve health.<sup>86</sup> Legal enactments are slow and almost entirely reactive to existing unethical conditions. Even then, the function of law in relationship to ethics is typically to set minimum standards, while ethics goes further to interrogate which actions are morally acceptable. Nonetheless, law can serve as a useful “enforcer of socially agreed upon values,”<sup>87</sup> and incentivize appropriate actions when appeals to ethics are insufficient alone.<sup>88</sup> In doing so, law does not transform compliance into a new standard of ethical acceptability, rather it may prevent or penalize egregious wrongdoing and ameliorate harms. At the same time, law is sometimes wielded as an instrument of oppression and subrogation, or an enforcer of existing power structures.<sup>89</sup> In the first six months of the pandemic, federal and some state actors selectively used legal powers in ways that rewarded the meat-processing industry and failed to protect workers.

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83. See, e.g., Dyal et al., *supra* note 2, at 557; see also *Structural Racism*, *supra* note 31, at 16–17 (describing a \$500 attendance bonus for April, almost as much as a week of pay).

84. See, e.g., Ramos, *supra* note 27 (“I’m scared to go to work without knowing the exact number of cases there are. *The \$30 [daily] bonus was useful in getting sick people to return to work.* That puts us all in more danger.” (emphasis added)).

85. *Id.*

86. See generally James R. Childress, et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MED. & ETHICS 170 (2002).

87. Charity Scott, *Why Law Pervades Medicine: An Essay on Ethics in Health Care*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 245, 257 (2000).

88. See *id.* at 258.

89. See, e.g., William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1148–79 (1989) (describing in part the acts of the judiciary in the nineteenth and early twentieth centuries to undercut the gains in the labor movements and reinforce the power of employers).

The Trump administration expressly favored less regulation of and more deference toward industry.<sup>90</sup> This was also true in many of the states in which meat processing plants operate.<sup>91</sup> In Nebraska, after plant outbreaks began, the governor stopped local health departments from announcing the numbers of cases tied to meat packing plants.<sup>92</sup> He also worked to prevent any temporary plant shut downs,<sup>93</sup> refused requests to implement state-level industry requirements to protect workers,<sup>94</sup> and asserted that civil unrest would result if processing plants were temporarily shut down as an infection control measure.<sup>95</sup> At the same time, law can be an instrument of protection rather than oppression and there are a variety of laws that could protect workers if enforced.<sup>96</sup>

#### A. *Legal Protections*

At the federal level, OSHA is responsible for enforcing the Occupational Safety and Health Act (OSH Act),<sup>97</sup> which was passed to “assure so far as

90. Keith B. Belton & John D. Graham, *Deregulation Under Trump*, REGUL., Summer 2020, at 14, 14, 18.

91. Nebraska, Arkansas, Mississippi, Missouri, Kansas, Georgia, Texas, and South Dakota are just a few states with meat processing outbreaks and who also have the least burdensome regulatory environment for businesses. See, e.g., WAYNE WINEGARDEN, PAC. RSCH. INST., THE 50-STATE SMALL BUSINESS REGULATION INDEX 5, 9, 11 (2015) (taking into consideration factors such as right to work status, workers compensation system, benefit requirements, and minimum wage requirements, among others).

92. See, e.g., Eric McKay, *State No Longer Allowed to Track Processing Plant Data*, NEWS CHANNEL NEB. (May 7, 2020, 10:31 AM), [https://northeast.newschannelnebraska.com/story/42102669/state-no-longer-allowed-to-track-processing-plant-data?fbclid=IwAR0IEKOS\\_NpE3gySZssH0tMkG-MMC8l-fjGTW4G9Y\\_mBELWHAthvB\\_8J2qQ](https://northeast.newschannelnebraska.com/story/42102669/state-no-longer-allowed-to-track-processing-plant-data?fbclid=IwAR0IEKOS_NpE3gySZssH0tMkG-MMC8l-fjGTW4G9Y_mBELWHAthvB_8J2qQ) (“Governor Pete Ricketts said Wednesday that the state won’t be releasing specific numbers of cases at meatpacking plants, saying it’s a matter of privacy.”).

93. See, e.g., Martha Stoddard et al., *Ricketts Defends Meatpacking Plants, Says They Need to Stay Open Despite Coronavirus Cases*, OMAHA WORLD HERALD (Apr. 23, 2020), [https://omaha.com/state-and-regional/ricketts-defends-meatpacking-plants-says-they-need-to-stay-open-despite-coronavirus-cases/article\\_300eda3a-a3bd-5276-884f-c4e5fb90db5b.html](https://omaha.com/state-and-regional/ricketts-defends-meatpacking-plants-says-they-need-to-stay-open-despite-coronavirus-cases/article_300eda3a-a3bd-5276-884f-c4e5fb90db5b.html).

94. See, e.g., Don Walton, *Nebraska Meatpacking Worker Advocates Seek Workplace Protections*, LINCOLN J. STAR (June 4, 2020), [https://journalstar.com/business/local/nebraska-meatpacking-worker-advocates-seek-workplace-protections/article\\_9d68739d-4e82-5f10-9a15-c663bf884b8.html](https://journalstar.com/business/local/nebraska-meatpacking-worker-advocates-seek-workplace-protections/article_9d68739d-4e82-5f10-9a15-c663bf884b8.html).

95. See, e.g., *Ricketts Warns of ‘Civil Unrest’ If Meatpacking Plants Close*, ASSOCIATED PRESS (Apr. 23, 2020), <https://www.ketv.com/article/ricketts-warns-of-civil-unrest-if-meatpacking-plants-close/32258716#>.

96. Engagement with every federal worker protection law is outside the scope of this Article. For an interesting review of labor and employment law using a historical perspective, see Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351 (2002).

97. For an overview of the history of federal laws leading up the passage of the OSH Act, see Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, U.S. DEP’T OF LABOR, <https://www.dol.gov/general/aboutdol/history/osha> (last visited Mar. 24, 2021).

possible every working man and woman in the Nation safe and healthful working conditions.”<sup>98</sup> The very language of the OSH Act includes appeals to reciprocity through mutual rights and obligations, including that “employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.”<sup>99</sup>

The OSH Act requires two kinds of duties from employers: a general duty and a special duty.<sup>100</sup> Employers’ general duty is to provide employees with a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”<sup>101</sup> The general duty clause has been interpreted to require employers to act in a reasonably prudent manner in protecting workers from new or unforeseen hazards (i.e., those for which a specific standard does not yet exist).<sup>102</sup> Those that violate the general duty clause face civil penalties.<sup>103</sup> The special duty requires employers to comply with specific standards promulgated by OSHA.<sup>104</sup> Violations of a specific standard, rule, order, or regulation may result in civil penalties, and in the case of willful violations, criminal liability, including fines and imprisonment.<sup>105</sup>

Most of the existing regulations promulgated by OSHA are targeted at reducing physical hazards in the workplace and exposure to toxic substances. There are no regulations that specifically apply to infectious disease transmission outside the healthcare work force. However, some regulations are relevant to COVID-19 transmission in the meat packing context. All employers have an affirmative duty to assess the workplace risks and hazards and to select, fit, and provide personal protective equipment (PPE) to reduce the risks to employees.<sup>106</sup> In addition, the employer must properly train the employee on both the rationale for PPE and its proper use (with retraining whenever necessary), and enforce its use.<sup>107</sup>

OSHA has considerable power to protect workers,<sup>108</sup> although the power to protect non-health care workers from serious and deadly respiratory infections

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98. Occupational Safety and Health Act of 1970, Public Law 91-596, 84 Stat. 1590, § 2(b) (1970) (amended 2004).

99. *Id.* § 2(b)(2).

100. See David St. John, et al., *Employment Law Violations*, 57 AM. CRIM. L. REV. 607, 609 (2020).

101. Occupational Safety and Health Act § 5(a)(1) (This is commonly referred to as the general duty provision.).

102. See e.g., *Fabi Constr. Co. v. Sec’y of Lab.*, 508 F.3d 1077, 1081 (2007).

103. Occupational Safety and Health Act § 17.

104. *Id.* § 5(a)(1), (6).

105. *Id.* § 17. See also David St. John, et al., *supra* note 100.

106. 29 C.F.R. § 1910.132(d) (2020).

107. *Id.* § 1910.132(f).

108. For a historical perspective on the OSH Act and the rights of employees to a safe work environment, see, for example, *All About Occupational Safety and Health Administration*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/archive/Publications/osha>

is limited by existing statutes and regulations.<sup>109</sup> In response to the COVID-19 pandemic, OSHA could enforce the PPE provisions as well as the general duty clause to protect meat processing and other non-health care workers.<sup>110</sup> OSHA could and should issue Emergency Temporary Standards (ETS).<sup>111</sup> ETSs are a statutory mechanism for emergency rule making with immediate effect upon publication and are valid for six months, available when “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and that such emergency standard is necessary to protect employees from such danger.”<sup>112</sup> Viewed as an extraordinary power applicable in limited situations, ETSs require both (1) grave danger and (2) a need to protect workers from that danger in the six-month time period for which the ETS is valid.<sup>113</sup>

The COVID-19 pandemic presents the narrow circumstances that justify an ETS. Although some courts have debated the level of evidence and types of harms that amount to a grave danger, those cases concerned dangers with long-term harms rather than the imminent illness and even death from COVID-19.<sup>114</sup> The most recent case to review OSHA action in issuing ETSs concluded that while grave danger is a policy determination, the harms an ETS hopes to alleviate must accrue “during the six-month period that is the life of the statute.”<sup>115</sup> In the fifty years since the OSH Act became effective, OSHA has issued ETSs sparingly but had never been presented with a new, widespread, deadly, and easily transmittable virus.<sup>116</sup> In fact, a deadly virus spread through

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2056.html#:~:text=OSHA%20uses%20three%20basic%20strategies,Partnerships%20and%20other%20cooperative%20programs (last visited Mar. 24, 2021).

109. During the H1N1 Pandemic, OSHA listed existing statutory and regulatory provisions that protect health care workers to which H1N1 protection could apply. See U.S. DEP’T OF LAB., DIRECTIVE NO. CPL-02-02-075, OSHA INSTRUCTION, ENFORCEMENT PROCEDURES FOR HIGH TO VERY HIGH OCCUPATIONAL EXPOSURE RISK TO 2009 H1N1 INFLUENZA (2009). However, for non-health care workers, there are no federal standards that apply to pathogen transmission and OSHA would need to issue an ETS or promulgate a new applicable standard to enforce special duty requirements.

110. Occupational Safety and Health Act § 5(a)(1).

111. *Id.* § 6(c)(1). For a comprehensive review of ETSs, see SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, at 19–20 (2020).

112. Occupational Safety and Health Act § 6(c)(1).

113. Mark A. Rothstein, *Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example*, 12 B.C. ENV’T AFFS. L. REV. 627, 670–77 (1985).

114. *Id.* at 670–73 (reviewing the elements for ETSs and cases that examined the criteria for grave danger).

115. *Asbestos Info. Ass’n v. Occupational Safety & Health Admin.*, 727 F.2d 415, 422 (5th Cir. 1984). See also SZYMENDERA, *supra* note 111.

116. For a review of all ETSs issued by OSHA, see Rothstein, *supra* note 113; SZYMENDERA, *supra* note 111. The HIV epidemic did give rise to the agency’s bloodborne pathogens standard at

droplet and aerosol transmission in workplaces meets the requirements of ETSS perhaps more precisely than any other situation for which ETSS have been issued.

Nevertheless, OSHA declined to issue an ETS, choosing instead only to issue voluntary recommendations together with the CDC for the protection of meat processing workers from COVID-19 (Joint Meat Processing Guidance).<sup>117</sup> Even then, the Trump administration and the Department of Labor went to great lengths to reassure the industry that “good faith attempts” at compliance were enough to avoid sanctions.<sup>118</sup>

Not only did the administration issue separate enforcement guidance explicitly stating they would not strictly hold the industry to the voluntary recommendations,<sup>119</sup> OSHA and the Solicitor of Labor issued an official press statement reinforcing that “good faith attempts” to comply are enough.<sup>120</sup> The press statement included additional claims that appear to disregard the agency’s purpose of worker protections altogether. First, it asserted that state authorities could not order a plant to close or comply with additional protections.<sup>121</sup> Second, the Department of Labor declared it would consider a request to participate in litigation and advocate *for the employer* in future lawsuits arising out of employees’ illnesses or deaths.<sup>122</sup>

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29 C.F.R. § 1910.1030 (2020), but those would not strictly apply to respiratory transmission not including blood.

117. U.S. Department of Labor’s OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Apr. 26, 2020), <https://www.osha.gov/news/newsreleases/national/04262020>.

118. See, e.g., Patrick J. Kapust & Scott Ketcham, *Discretion in Enforcement When Considering an Employer’s Good Faith Efforts During the Coronavirus Disease 2019 (COVID-19) Pandemic*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Apr. 16, 2020), <https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during>; Patrick J. Kapust, *Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

119. Kapust & Ketcham, *supra* note 118.

120. *Statement of Enforcement Policy by Solicitor of Labor Kate O’Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt Regarding Meat and Poultry Processing Facilities*, U.S. DEP’T OF LAB. (Apr. 28, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200428-1>.

121. *Id.* (“No part of the Joint Meat Processing Guidance should be construed to indicate that state and local authorities may direct a meat and poultry processing facility to close, to remain closed, or to operate in accordance with procedures other than those provided for in this Guidance.”).

122. *Id.* (“In addition, courts often consider compliance with OSHA standards and guidance as evidence in an employer’s favor in litigation. Where a meat, pork, or poultry processing employer operating pursuant to the President’s invocation of the DPA has demonstrated good faith attempts to comply with the Joint Meat Processing Guidance and is sued for alleged workplace exposures,

Of the hundreds of meat processing plants that have had serious outbreaks, OSHA has sanctioned only two under the only mechanism available in the absence of COVID-19 specific ETSs, the general duty clause of the OSH Act.<sup>123</sup> A Smithfield plant in South Dakota was fined \$13,494 for violating the general duty clause of the OSH Act after 1294 workers contracted coronavirus and four employees died—roughly \$10 per infected employee (less than one hour of their pay).<sup>124</sup> Smithfield is expected to contest even this minimal fine and OSHA’s findings.<sup>125</sup> OSHA also fined a JBS plant in Colorado less than \$16,000 for violating the general duty clause and a separate rule on turning over records.<sup>126</sup> Again, this nominal fine was a painless slap on the wrist considering that JBS is a multi-billion dollar corporation that reported an almost thirty-three percent increase in net profits in the second quarter of 2020, despite the pandemic.<sup>127</sup> Under the Trump administration, OSHA failed to align its actions with its statutory purpose of protecting workers, leaving meat processing and other non-professional essential workers at ongoing risk of serious illness and even death from industry practices that prioritized profits over people.

It is unsurprising that many meat processing workers are employed in plants that have implemented neither the Joint Meat Processing Guidance<sup>128</sup> nor the

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the Department of Labor will consider a request to participate in that litigation in support of the employer’s compliance program.”).

123. The general duty clause was “enacted to cover serious hazards to which no specific standard applies.” Rothstein, *supra* note 113, at 645. See also Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html>.

124. See *U.S. Department of Labor Cites Smithfield Packaged Meats Corp. for Failing to Protect Employees from Coronavirus*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020>. The CDC described the initial outbreak at the plant, which they describe as Facility A, and concluded more rapid implementation of infection prevention and control measures may have reduced its impact. See Jonathan Steinberg et al., *COVID-19 Outbreak Among Employees at a Meat Processing Facility — South Dakota*, 69 MORBIDITY & MORTALITY WKLY. REP. 1015, 1018 (2020).

125. See Tom Polansek & P.J. Huffstutter, *U.S. Cites Smithfield Foods for Failing to Protect Workers from Coronavirus*, REUTERS (Sept. 10, 2020), <https://www.reuters.com/article/health-coronavirus-usa-smithfield/u-s-cites-smithfield-foods-for-failing-to-protect-workers-from-coronavirus-idINL1N2G711X>; *State Highlights*, 43 WORKERS’ COMP. L. BULL. NL 6 (2020). Smithfield is a multi-billion-dollar company. Smithfield did post lower than expected earnings in the second quarter of 2020 because of the millions they have spent for PPE, new paid time off for employees, and other measures; however, they still enjoyed hundreds of millions in profits that quarter. See Ryan McCarthy, *Smithfield Reports Q2 Operating Loss*, MEATPOULTRY.COM (Aug. 12, 2020), <https://www.meatpoultry.com/articles/23626-smithfield-reports-q2-operating-loss> (noting that first quarter profits were 190% higher than 2019 but that “the company showed \$102 million in second-quarter operating profit, but it was still well below the 2019 number of \$221 million”).

126. *DOL Cites JBS Foods Inc.*, *supra* note 13.

127. JBS, EARNINGS RELEASE SECOND QUARTER 2020, at 1 (2020).

128. See Cristin Nelson, *The New Rules Have Not Made Meatpacking Work Safer*, STONE PIER PRESS (July 12, 2020), <https://stonepierpress.org/goodfoodnews/meatpackingworkersafety>; see

recommendations from other public health authorities.<sup>129</sup> Some of the plants that undertook most of the recommendations began rolling them back after a few months.<sup>130</sup> This is concerning because every worker remains at risk—even those who contracted COVID-19 and generated an immune response may no longer have immunity.<sup>131</sup>

Absent robust enforcement by OSHA and uniform industry commitments to safety, government and private actors have tried to effect change. Some states have taken action to establish their own requirements for meat processing plants.<sup>132</sup> Under the OSH Act, states can choose to follow the federal standards and OSHA's enforcement regime or create a state plan approved by OSHA with identical or stronger worker protections.<sup>133</sup> Those states with existing OSHA approved plans were more quickly able to act to protect meat processing workers in the face of federal inaction. For example, Virginia issued an emergency rule specific to SARS-CoV-2 transmission as part of their state OSHA plan, which specifically applied to meat processing facilities.<sup>134</sup> Other states, like California, had existing protections in their state plans specific to aerosolized pathogens like SARS-CoV-2.<sup>135</sup>

Still other states used executive action. In Michigan, a July 2020 Executive Order included comprehensive worker protections, including a section with

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*also Interim Guidance for Meat and Poultry Processing Workers and Employers*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> [hereinafter *Interim Guidance*].

129. See Nelson, *supra* note 128. See generally HERSTEIN ET AL., *supra* note 79.

130. See, e.g., Kate Taylor, *Tyson Reverts to Its Pre-Pandemic Absentee Policy. More Than 7,100 Workers Have Tested Positive for COVID-19, Including Hundreds in Recent Weeks*, BUSINESS INSIDER (June 8, 2020), <https://www.businessinsider.com/tyson-ends-covid-19-policy-as-more-workers-get-sick-2020-6> (reporting on Tyson rolling back policies that would have allowed sick workers to stay home just weeks after they were put in place).

131. About a third of people with a COVID infection develop little immunity. See David S. Stephens & Julianna McElrath, *COVID-19 and the Path to Immunity*, 324 JAMA 1279, 1279 (2020). COVID-19 infection immunity may only last around ninety days. See, e.g., F. Javier Ibarrondo, et al., *Rapid Decay of Anti-SARS-CoV-2 Antibodies in Persons with Mild Covid-19*, 383 NEW ENG. J. MED. 1085, 1086 (2020) (conducting a study in which antibodies to SARS-Cov-2 declined steadily over eighty-six days post-infection).

132. See Kyle Bagenstose et al., *Coronavirus at Meatpacking Plants Worse Than First Thought, USA TODAY Investigation Finds*, USA TODAY (Apr. 27, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/04/22/meat-packing-plants-covid-may-force-choice-worker-health-food/2995232001/>.

133. See *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/stateplans/> (last visited Apr. 12, 2021). Of course, this leaves states that choose to follow the federal standards with fewer options if a new danger appears and OSHA doesn't act to protect workers.

134. VA. DEP'T OF LAB. & INDUS., 16VAC25-220, EMERGENCY TEMPORARY STANDARD INFECTIONS DISEASE PREVENTION: SARS-CoV-2 VIRUS THAT CAUSES COVID-19, at 12 (2020).

135. CAL. CODE REGS. 8 § 5199 (2018).

specific safety standards for meat processing plants in the state.<sup>136</sup> However, a decision by the Michigan Supreme Court in early October effectively invalidated many of the governor's executive orders related to COVID-19,<sup>137</sup> and the Attorney General announced she would no longer enforce them.<sup>138</sup> Nonetheless, on October 14, 2020, the state agency charged with workplace protections issued an emergency rule to protect workers with language quite similar to the July 2020 Executive Order.<sup>139</sup> Many states, however, have no existing protections specific to infectious diseases and meat processing workers, and have no plans to institute further protections.<sup>140</sup>

Some have tried to force plant compliance through suits in equity; however, at least one federal court has dismissed a case seeking injunctive relief against a large meat processing corporation based on the primary jurisdiction doctrine. In *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, a meat processing worker and a workers' advocacy group brought public nuisance and breach of duty claims against Smithfield Foods, alleging an unsafe workplace and seeking injunctive relief.<sup>141</sup> The court dismissed the case, holding that the plaintiffs' claims based on the company's failure to fully adopt safety measures was a matter in the jurisdiction of OSHA rather than individual courts under the primary jurisdiction doctrine.<sup>142</sup>

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136. OFF. OF THE GOVERNOR, EXEC. ORDER NO. 2020-145, SAFEGUARDS TO PROTECT MICHIGAN WORKERS FROM COVID-19 (2020) (using the State Emergency Management Act to create standards, including Section 14 specific to meat processing, the violations of which would be punishable as misdemeanors).

137. *In re* Certified Questions from U.S. Dist. Court, W. Dist. of Mich., S. Div., No. 161492, 2020 WL 5877599, at \*3 (Mich. Oct. 2, 2020) (holding that the Emergency Powers of the Governor Act is unconstitutional as an unlawful delegation of legislative power to the executive branch and that orders under the Emergency Management Act after April 30, 2020, were void because of the governor's non-compliance with requirements to continue a state of emergency under that Act).

138. See, e.g., Beth LeBlanc, *After High Court Decision, Michigan AG Will Not Enforce COVID Orders*, DETROIT NEWS (Oct. 4, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/10/04/after-high-court-decision-michigan-ag-not-enforce-covid-orders/3616380001/>.

139. DEP'T OF LAB. & ECON. OPPORTUNITY, MICH. OCCUPATIONAL SAFETY & HEALTH ADMIN., EMERGENCY RULES: CORONAVIRUS DISEASE 2019 (COVID-19) (2020).

140. See Bagenstose et al., *supra* note 132.

141. *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 WL 2145350, at \*6–7 (W.D. Mo. May 5, 2020) (“seeking to force Smithfield to: provide masks; ensure social distancing; give employees an opportunity to wash their hands while on the line; provide tissues; change its leave policy to discourage individuals to show up to work when they have symptoms of the virus; give workers access to testing; develop a contact-tracing policy; and allow their expert to tour the Plant”).

142. *Id.* at \*11 (noting that the primary jurisdiction doctrine should be applied sparingly but is justified when it is necessary “to obtain the benefit of an agency's expertise and experience . . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion” or “to promote uniformity and consistency within the particular field of regulation”).



The OSH Act includes a mechanism for imperiled employees to bring actions in equity when OSHA fails to protect workers in imminent danger from unsafe working conditions.<sup>143</sup> Under 29 U.S.C. § 662(d), employees may seek emergency mandamus relief when OSHA has arbitrarily or capriciously failed to take action against employers when “conditions or practices . . . are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through [typical] enforcement procedures.”<sup>144</sup>

One such current case, *Jane Does v. Scalia*, involves a meat processing facility, with workers and a workers’ rights organization alleging that a meat processing plant in Pennsylvania failed to protect workers, months after guidance from the CDC and OSHA became available—choosing profits over worker safety.<sup>145</sup> The complaint alleges myriad failures, including the plant violating its duty to protect workers from the dangers of COVID-19, in part by

failing to provide cloth face coverings, configuring the production line in such a way that workers cannot social distance, failing to arrange for social distancing in other areas of the plant, failing to provide adequate handwashing opportunities, creating incentives for workers to attend work sick, failing to inform workers of potential exposures to COVID-19, and rotating-in workers from other facilities in a way that increases the risk of spreading the virus.<sup>146</sup>

At the time of this writing, the matter is ongoing.<sup>147</sup>

The *Jane Does* court is likely to treat the case as a petition for the court to review the reasonableness of OSHA’s decision, not to issue an ETS, as is typical for actions brought under 29 U.S.C. § 662(d).<sup>148</sup> At least one other action concerning OSHA’s decisions not to issue COVID-19 related ETSs has already been denied by the D.C. District Court.<sup>149</sup> That court concluded that OSHA’s

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143. 29 U.S.C. § 662(a).

144. *Id.* Section 662(d) provides “If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia, for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.” *Id.* § 662(d).

145. Complaint and Emergency Petition for Agency Mandamus Relief at 1, 20, *Jane Does I, II, III et al. v. Scalia et al.*, No. 3:20-CV-01260 (M.D. Pa. filed July 22, 2020).

146. *Id.* at 2–3.

147. The docket for case No. 3:20CV01260 is available at [https://www.westlaw.com/Document/I181F4A4ACC5D11EA8C24C7BE4F705CAD/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1](https://www.westlaw.com/Document/I181F4A4ACC5D11EA8C24C7BE4F705CAD/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1).

148. *See, e.g., In re Int’l Chem. Workers Union*, 830 F.2d 369, 370–71 (D.C. Cir. 1987) (denying petitioner’s request and determining that OSHA acted reasonably in the face of incomplete evidence in choosing not to issue an ETS).

149. *In re Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, No. 20-1158, 2020 WL 3125324, at \*1 (D.C. Cir. June 11, 2020).

decision to forgo ETSs was reasonable “[i]n light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments.”<sup>150</sup>

For workers who are not protected and fall ill or die from COVID-19, state workers’ compensation laws may or may not apply. In some states, harm from infectious diseases, such as COVID-19, are covered by the states’ workers’ compensation regime, as long as the disease arose out of employment.<sup>151</sup> In other states, obtaining relief via the workers’ compensation system may be difficult or next to impossible. Besides proving the disease arose out of or in the course of employment, a claimant may also have to prove the illness did not result from causes outside of employment—a difficult matter to prove in the case of COVID-19.<sup>152</sup> In some states, such as Nebraska, COVID-19 infections contracted at work that did not result from causes outside of work may still be outside the scope of workers’ compensation.<sup>153</sup> For example, the worker may need to show that the infection was “due to causes and conditions which are characteristic of and peculiar to . . . [the] . . . employment and *excludes all ordinary disease of life to which the general public is exposed.*”<sup>154</sup> When and if workers’ compensation will apply to workplace-related COVID-19, and whether workers’ compensation is the exclusive remedy, varies by state and circumstance.<sup>155</sup>

Infected workers and their families may need to turn to tort remedies instead or in addition to the workers’ compensation system. Already, wrongful death claims against employers are making their way through the system.<sup>156</sup> However, tort remedies will be limited in many states, as many have passed limited liability and immunity provisions that could apply to meat processing facilities.<sup>157</sup> Those

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150. *Id.*

151. *See, e.g.,* *Beshears v. Pilgrim’s Pride Corp.*, 954 F. Supp. 2d 500, 507 (N.D. Tex. 2013) (holding infectious diseases are covered by workers’ compensation laws, which are also the exclusive remedy for such illnesses).

152. *See, e.g.,* *Steadman v. Liberty Fabrics, Inc.*, 465, 468 S.E.2d 465 (Va. App. 2003).

153. *See, e.g.,* NEB. REV. STAT. § 48-151(3) (2018).

154. *Id.* (emphasis added). For a comprehensive review of workers’ compensation requirements by state, see generally Stephen A. Brunette, *Causes of Action to Recover Workers’ Compensation Benefits for Occupational Diseases*, 15 CAUSES ACTION 61 (originally published in 1988).

155. The complexities of when and if workers’ compensation regimes are outside the scope of this Article. For more information, see generally Brunette, *supra* note 135. For a recent dispute, see, for example, Petition for Writ of Certiorari at i, *John Devos v. Rhino Contracting, Inc., et al.*, No. 20-159, (U.S. petition for cert. denied Oct. 13, 2020).

156. *See, e.g.,* Betsy J. Grey & Samantha Orwoll, *Tort Immunity in the Pandemic*, 96 IND. L.J. SUPP. 1, 11 (2020) (describing several such cases against employers).

157. For a general discussion of recent state action to limit liability of businesses from COVID-19, see generally Thomas F. Morante & Yani R. Contreras, *Liability Immunity Laws for Businesses May Impact Insurance Industry*, ABA BUS. L. TODAY (June 23, 2020), <https://www.americanbar>

that offer the protections as a defense, upon a showing of compliance with public health guidelines, could actually incentivize the industry to comply with the Joint Meat Processing Guidance.

At the federal level, some Republican lawmakers advanced bills with uniform liability protections, with the support of multiple state Governors, including Governor Ricketts of Nebraska.<sup>158</sup> For example, the Pandemic Liability Protection Act grants immunity to health care providers and food providers (including food processing and packaging plants) for “any act or omission . . . [for] any harm arising from exposure to, or infection by, the virus that causes COVID-19.”<sup>159</sup> The Employer and Employee COVID Protection Act exempts employers from liability in state or federal court for any injury that resulted from an employee contracting COVID-19.<sup>160</sup> Senate Bill 3915, on the other hand, takes a more measured approach, but still grants immunity to employers for employee claims as long as the employer was operating in compliance with CDC guidelines, and federal and state operating requirements.<sup>161</sup> While none of these bills became laws, it is unclear if similar legislation will pass in the current congressional session.

Over a year into the pandemic, how and if legal and regulatory levers apply to protect and compensate workers is variable and uncertain. Inconsistent implementation and enforcement of legal protections present significant challenges for public health practitioners advising government, industry, and community stakeholders on ways to prevent COVID-19 infection and transmission in meat processing plants. This is especially challenging in an environment where politics and federal deregulatory actions prioritize industries’ economic interests over public health. Public health practitioners face complex ethical and pragmatic concerns at the intersection of worker safety, business operations, and public well-being. Navigating these concerns requires adherence to core public health values.

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.org/groups/business\_law/publications/blt/2020/07/liability-immunity-laws/; Michael D. Shalhoub & Steven S. Vahidi, *Viewpoint: Federal and State Civil Immunity from COVID-19 Lawsuits*, CLAIMS J. (Sept. 8, 2020), <https://www.claimsjournal.com/news/national/2020/09/08/299170.htm>.

158. See Letter from Eric Holcomb, et al., Governor, State of Indiana, to Senate and House Leaders (July 21, 2020), [https://mcusercontent.com/3302177a320983d559c9bfb6a/files/7cb55ca8-0df1-4bcb-a93b-250a970cb2cc/Joint\\_Governors\\_Letter\\_to\\_Congress\\_on\\_Liability\\_Protections\\_7.21.2020.pdf](https://mcusercontent.com/3302177a320983d559c9bfb6a/files/7cb55ca8-0df1-4bcb-a93b-250a970cb2cc/Joint_Governors_Letter_to_Congress_on_Liability_Protections_7.21.2020.pdf) (advocating for federal civil liability protections for health care workers, businesses, and schools to “shield employers from legal risks”).

159. H.R. 7179, 116th Cong. § 2 (2020).

160. H.R. 6844, 116th Cong. §§ 1–2 (2020).

161. S. 3915, 116th Cong. § 4 (2020).

### B. Public Health Ethics

Public health ethics, unlike traditional medical ethics, is centered on populations rather than individuals.<sup>162</sup> All plans to protect the public have a moral dimension and “presuppose certain ethical values, principles, norms, interests, and preferences.”<sup>163</sup> During a pandemic, the need to center actions in an ethical framework is even greater than during other types of public health decision making. Amid the fear, uncertainty, and evolving science characteristics of a pandemic, history has revealed that a failure to explicitly engage ethics entails tangible consequences including loss of public trust, confusions about responsibilities, and stigmatization of vulnerable groups.<sup>164</sup> Though these lessons were explored after previous pandemics, they were not well heeded during COVID-19.<sup>165</sup> As Thompson et al. have explained,

The ethical framework is intended to inform decision-making, not replace it. It is intended to encourage reflection on important values, discussion and review of ethical concerns arising from a public health crisis. It is intended also as a means to improve accountability for decision-making and may require revision as feedback and circumstances require.<sup>166</sup>

This Article offers some explicit ethical considerations in hopes they may be useful for ongoing planning and treatment of workers during the remainder of this pandemic and during future infectious disease outbreaks.<sup>167</sup>

Public health is centered on communities and public health ethics are therefore understood as relational.<sup>168</sup> Decisions about public health should recognize that people are social and interdependent and are “conditioned by opportunities and obstacles that shape their lives.”<sup>169</sup> Several core relational principles ground decision making about protecting workers. Among the most salient are health and safety, health justice,<sup>170</sup> and community values (including

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162. See e.g., Lisa M. Lee, *Public Health Ethics Theory: Review and Path to Convergence*, 40 J.L. MED. & ETHICS 85, 85–86 (2012).

163. Alison K. Thompson, et al., *Pandemic Influenza Preparedness: An Ethical Framework to Guide Decision-Making*, 7 BMC MED. ETHICS, no. 12, 2006, at 1, 2 (citing JARO F. KOTALIK, ADDRESSING ISSUES AND QUESTIONS RELATING TO PANDEMIC INFLUENZA PLANNING: FINAL REPORT AND RECOMMENDATIONS (2003).)

164. *Id.*

165. See, e.g., Melissa McCullough, *Ethical Decision Making in a Pandemic: Where Are the Voices of Vulnerable People?*, 369 BMJ 2406, 2407 (2020).

166. Thompson et al., *supra* note 163.

167. In this brief Article, I cannot hope to do justice to these ethical values and the extensive scholarship on each of them from a multitude of interdisciplinary scholars. What I share here are simply boiled down explanations for practical use.

168. See, e.g., Nuala P. Kenny et al., *Re-Visioning Public Health Ethics: A Relational Perspective*, CAN. J. PUB. HEALTH, Jan./Feb. 2010 at 9, 10.

169. *Id.*

170. Health justice and equity represent here a collection of concepts described by leading scholars over time in public health ethics. See, e.g., Lee, *supra* note 162, at 95. (“Different terms in

respect for persons, solidarity, and reciprocity).<sup>171</sup> These values should form a framework for action by the political and industry forces that influence non-health care worker safety in the COVID-19 pandemic.

Health and safety—necessary conditions for human flourishing—require measures that effectively promote health and well-being while preventing, minimizing, and mitigating health harms.<sup>172</sup> This is a threshold matter and the primary goal of ethical public health action, or what Goldberg describes as the “absolute health” goal.<sup>173</sup> However, the absolute health goal is unattainable without attention to the social, legal, historical, and cultural conditions that lead to health injustices.

Reducing health inequities, or what Goldberg calls the “relative health” goal of ethical health policy,<sup>174</sup> is tied to ethical principle of health justice.<sup>175</sup> This has both distributive and procedural dimensions.<sup>176</sup> In this case, health justice may be understood as using policy to provide populations with the sufficient and proportionate resources and opportunities (*e.g.*, access to protective equipment, health care, and food security) in consideration of existing disadvantages through a process that builds trustworthiness in policy makers.<sup>177</sup> Attending to justice requires policy makers to “recenter[] the narrative on the marginalized”<sup>178</sup> to prevent the perpetuation or exacerbation of inequity.<sup>179</sup> Distributive health justice requires the reasonable, equitable, and proportionate distribution of resources and burdens.<sup>180</sup> Procedural health justice requires that

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numerous frameworks specify similar concepts. For example, what Kass calls “social justice” is similar conceptually to what Childress call “distributing burdens and benefits,” Upshur calls “nondiscrimination,” Thompson et al. call “equity,” Baum et al. call “fairness,” Swain et al. and Jaffe et al. call “justice,” Petrini et al. call “equal opportunity for health resources,” the Nuffield Council of the note calls “equality between citizens,” and Kenny et al. call “relational solidarity.” The conceptual likeness of these terms represents the shared common values of respect for persons and protection of public health across the frameworks.”)

171. *E.g.*, AM. PUB. HEALTH ASS’N, PUBLIC HEALTH CODE OF ETHICS 5–10 (2019).

172. *Id.* All actions have to be evaluated for effectiveness in the first instance.

173. DANIEL S. GOLDBERG, PUBLIC HEALTH ETHICS AND THE SOCIAL DETERMINANTS OF HEALTH 8 (2017).

174. *Id.*

175. *See, e.g., id.*; AM. PUB. HEALTH ASS’N, *supra* note 171; Lee, *supra* note 162.

176. *E.g.*, AM. PUB. HEALTH ASS’N, *supra* note 171.

177. *See, e.g.*, McCullough, *supra* note 165 (“The principle of accountability requires transparency about how and which decisions need to be made and on what basis, accepting responsibility for your actions, and being willing to be answerable to the outcomes of the choices, decisions, and actions made.”).

178. Craig M. Klugman, *What Is a Bioethics of the Oppressed in the Age of COVID-19?*, AM. J. BIOETHICS, 2020, at 29, 30.

179. *See e.g.*, McCullough, *supra* note 165.

180. *See generally* James C. Thomas & Nabarun Dasgupta, *Ethical Pandemic Control Through the Public Health Code of Ethics*, 110 AM. J. PUB. HEALTH 1171, 1171 (2020); GOLDBERG, *supra* note 173, at 20, 22.

policy makers act in trustworthy ways (reliably, authentically, and consistently) to earn trust from those burdened with keeping essential industries operating during the pandemic.<sup>181</sup>

Community values are also essential to ethical action in a pandemic. More than a collection of individual members, community is an ecosystem of interdependent relationships and interests.<sup>182</sup> Respect for persons requires bi-directional acknowledgement of individuals' inherent worth (regardless of individual productivity, abilities, or social standing)<sup>183</sup> and their membership in community. This is a kind of solidarity, not in the strict sense of assumptions about collective identity, but rather, "shared interests in survival, safety and security."<sup>184</sup> Reciprocity is a component of solidarity (and also the principle of justice in the sense of fairness) and calls for recognizing relationships of mutual exchange and acknowledging that those who accept disproportionate burdens are owed something in return. Reciprocity requires governments and industry to acknowledge burdens assumed by workers and offer protective interventions in return.<sup>185</sup>

Measures to protect the public good (including the food supply and economy) during this pandemic continue to impose disproportionate burdens on workers in essential industries and their families. Decisions by the government and industry should be grounded in respect for these workers as people and community members and in light of the continued disadvantage of structural, institutional, and individual discrimination. Actions that promote the health of and minimize risks to these workers and their communities are not only ethically appropriate, but also prudent. Their continued labor (and ability to continue) is the engine that drives this multi-billion-dollar industry. These workers were owed better before the pandemic; however, the pandemic has quickly exposed the vulnerabilities of inequitable policies and the harms from decades of an industry treating workers as fungible. Workers have assumed additional risks during the pandemic and allowed the industry to remain profitable. In return, they are owed measures that protect their health and safety and advance their interests and those of their communities.

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181. AM. PUB. HEALTH ASS'N, *supra* note 171. For an approach from Ireland, see AN ROINN SLAINTE, DEP'T OF HEALTH, ETHICAL FRAMEWORK FOR DECISION-MAKING IN A PANDEMIC 8 (2020).

182. *E.g.*, Leonard W. Ortmann et al., *Public Health Ethics: Global Cases, Practice, and Context*, in 3 PUB. HEALTH ETHICS: CASES SPANNING THE GLOBE 3, 24 (D. H. Barrett et al. eds., 2016).

183. Bruce Jennings, *Relational Ethics for Public Health: Interpreting Solidarity and Care*, 27 HEALTH CARE ANALYSIS 4, 9, 10 (2019).

184. Kenny et al., *supra* note 168, at 10.

185. *See generally* CARL COLEMAN ET AL., WORLD HEALTH ORG., ETHICAL CONSIDERATIONS IN DEVELOPING A PUBLIC HEALTH RESPONSE TO PANDEMIC INFLUENZA 2, 14 (2007) (discussing reciprocal obligations of governments to health care workers during a pandemic).

## IV. A FRAMEWORK FOR PROTECTING WORKERS

The industry's pre-pandemic adherence to its ethical and legal obligations to workers was weak at best. The pandemic exposed the disproportionate harms emanating from that weak foundation. The industry is ethically and legally obligated to provide reasonably safe physical working conditions, including modifications to mitigate infection risks based on the best available transmission science and public health guidance. Modifications to physical conditions are particularly critical because these workers are already vulnerable from years of unsafe workplaces and structural discrimination, leaving them with few options or advocates.<sup>186</sup> An industry that has benefited from decades of disempowered workers has a heightened reciprocal duty and justice-based obligations to ensure protective measures in the workplace. This duty extends beyond the pandemic. Governments that continue to benefit from uninterrupted food supplies and from the labor of these workers owe them accessible information about the pandemic (including accounting for cases by plant and industry, race, ethnicity, and immigration status), enforcement of existing legal protections, and enactment of new policies that account for the increased risks of harms based on existing health inequities.

The following recommendations are organized in three interconnected groups: (1) physical protections in the workplace; (2) institutional (plant and industry) organizational norms in the form of policies, practices, and rules;<sup>187</sup> and (3) structural (governmental) actions to protect workers.

The success of physical protections and many industry policies depends on an ethical climate in the workplace and a culture of safety.<sup>188</sup> This includes both messaging and action from facility leadership, including line supervisors,<sup>189</sup> as well as safety concern reporting mechanisms and robust whistleblower protections. A path toward ensuring consistent adherence to pandemic workplace safety requirements is necessary to satisfy the underlying ethical values of reciprocity and equity.

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186. HUM. RTS. WATCH, *supra* note 35, at 1, 75.

187. See, e.g., Louise Manning, *Moving from a Compliance-Based to an Integrity-Based Organizational Climate in the Food Supply Chain*, 19 COMPREHENSIVE REVS. FOOD SCI. & FOOD SAFETY 995, 996 (2020) ("Organizational norms, the informal or formal rules that regulate and regularize compliance behavior are usually prescribed in policies, protocols, procedures, rules, or job descriptions and underpinned by a formal management system.") (internal citations omitted).

188. See generally K. Praveen Parboteeah & Edward Andrew Kapp, *Ethical Climates and Workplace Safety Behaviors: An Empirical Investigation*, 80 J. BUS. ETHICS 515 (2008) (examining the relationships between company ethical climates and orientations, employee safety behaviors, and injuries).

189. See e.g., E.A. Kapp, *The Influence of Supervisor Leadership Practices and Perceived Group Safety Climate on Employee Safety Performance*, 50 SAFETY SCI. 1119, 1123 (2012) (finding positive relationships between line supervisor leadership practices, a culture of safety, and safety compliant practices by employees).

The industry has an opportunity to transform from embodying an egoist ethical climate (profit and efficiency over all else) to a principled ethical climate (morality, professional obligations, and laws matter),<sup>190</sup> the latter of which is empirically associated with safety-enhancing behavior in the workplace.<sup>191</sup> In other words, from short-term profit and production at the cost of human health to long-term profit while valuing workers as members of the community and as worthy of respect. During this transition and especially during the pandemic, it is necessary to uphold adherence to regulatory guidance and legal mandates as an imperfect measure of the minimally ethically required industry interventions to protect workers.

A. *Provide Safe Physical Conditions in the Plants*

1. Industry-wide Mandatory Administrative and Engineering Controls, Including PPE

The Joint Meat Processing Guidance,<sup>192</sup> as well as other public health authority guidance,<sup>193</sup> includes engineering (*e.g.*, physical barriers, ventilation standards, and enhancements) and administrative controls (*e.g.*, physical distancing, active screening, and environmental disinfection) to reduce transmission within facilities. The Joint Meat Processing Guidance calls for appropriate PPE, which is also mandated by OSHA regulations.<sup>194</sup> PPE shortages during the pandemic made absolute protection impossible in the absence of invocation of the Defense Production Act to increase supply,<sup>195</sup> necessitating a harm reduction approach (*i.e.*, when absolute harm avoidance is impossible because of policy failures and the incentives to take risks, approaches that minimize harms are required).<sup>196</sup> The CDC's temporary guidance on optimal use of available PPE during times of scarcity was originally aimed at health care settings,<sup>197</sup> but should apply to essential industries, such as meat processing facilities, to reduce harms to workers by providing the best possible level of protection under pandemic circumstances.

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190. See Manning, *supra* note 187, at 1000 tbl.4; Parboteeah & Kapp, *supra* note 188.

191. See Parboteeah & Kapp, *supra* note 188, at 525–27.

192. *Interim Guidance*, *supra* note 128.

193. See generally HERSTEIN ET AL., *supra* note 79.

194. 29 C.F.R. § 1910.132(a), (h)(1) (2014).

195. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-701, COVID-19 FEDERAL EFFORTS COULD BE STRENGTHENED BY TIMELY AND CONCERTED ACTIONS (2020).

196. See, *e.g.*, Daniel Weinstock, *A Harm Reduction Approach to the Ethical Management of the COVID-19 Pandemic*, 13 PUB. HEALTH ETHICS 166, 167 (2020).

197. *Healthcare Workers Optimizing PPE Supplies*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html>.



These actions to protect workers in the plant are ethically required, even if good faith compliance is enough in some areas to survive a legal challenge.<sup>198</sup> Workers continue to work at their own peril to keep the plants operating, which benefits the corporations and state and local economies, and keeps the food supply chain viable. Each of these stakeholders sits in relationship to one another and disruption in one part promises disruption in the others. Safe conditions also increase the probability of a continuing sufficient workforce by reducing absences related to viral exposure and quarantine or sickness. Beyond effectiveness in the short and long term, it is morally problematic to expect further sacrifice from workers who already experience compound disadvantage both during the pandemic and beyond. It is not reciprocal, just, or respectful. Attending to health justice, equity, and community values requires that industry comply in all respects with existing guidance to protect workers.

## 2. Adjusted Line-Speeds and Workflows

In non-pandemic times, meat-processing facilities measure success by production, which is influenced heavily by line speed and workflow.<sup>199</sup> While line speed waivers were always controversial in terms of worker safety, the fact that the government continued to grant waivers in the midst of facility COVID-19 outbreaks is indefensible and morally tenuous.<sup>200</sup> In fact, in most cases the line speeds must decrease because of the reduced workforce from illness and the demands of physical distancing on the line. Facilities that refuse to reduce line speeds and adjust work-flow relative to available workers are putting their workers at risk of a deadly disease—this is not equitable burden sharing. Production levels must be reconciled with the urgent need to prevent and mitigate infection.

The industry that profits from the labor of meat processing workers must shoulder the burden of line speed adjustments in exchange for workers taking on the risk of illness and death to maintain some level of production.

## B. *Non-Physical Institutional Practices and Policies*

### 1. Consistent Application and Communication of Infection Prevention and Control Policies

Putting IPC policies in place is meaningless if they are not widely disseminated and consistently applied and enforced (especially as against supervisors and others in positions of power over front line workers). Even in

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198. *See infra* Part III.

199. *See supra* Part II.B.

200. Letter from Safe Food Coalition to Dr. Mindy M. Brashears, Undersecretary for Food Safety, Food Safety & Inspection Serv., U.S. Dep't of Agric. (Apr. 22, 2020) (on file with Safe Food Coalition).

facilities that have adopted appropriate safety measures, shadow policies aimed at productivity over safety continue—especially by frontline supervisors who have long been rewarded for increasing productivity at all costs. Some supervisors continue to enforce pre-pandemic policies, including disciplinary point systems or higher line speeds.<sup>201</sup> These shadow policies seriously undermine the efficacy of pandemic-specific protections and create tangible risks for both worker health and longer-term facility operations.

All levels of facility leadership—including line and floor supervisors—bear responsibility for implementing, enforcing, and appropriately disseminating information on COVID-19 policies, delivered in culturally and linguistically appropriate ways.

## 2. Reward Safety

Workers need paid time off and policies that reward safety and compliance rather than incentivize attendance. The general lack of paid time off means people will report to work when they should not. The addition of attendance bonuses, which was common during outbreaks, is short sighted and harm inducing. These practices, coupled with the point systems that punish workers for caring for themselves and others by staying home after exposure or during illness, must be eliminated.<sup>202</sup> During the pandemic, these policies are unequivocally problematic. Without paid time off or personal financial reserves, workers are compelled to work through illness despite the direct threat to themselves and others simply to keep their jobs. The spread of preventable sickness and death among workers and in the community under these conditions is a forgone conclusion.

Suspending punitive sick leave policies and attendance bonuses during the pandemic is a matter of justice and harm reduction; it acknowledges reciprocal responsibilities to workers who assume heightened risks and demonstrates a respect for workers and their families. It does cost the industry money, but in the end it serves long-term business interests. By maintaining a healthy workforce, facilities increase the likelihood of continuous production—a benefit to the facility and the workers.

## 3. Provide Information and Advocacy Strategies to Workers

Workers need information about COVID-19 and IPC strategies. Because of the multiple languages spoken in the plant and varying cultural norms, the form of delivery and person of the messenger will determine how well it is received. The information should be delivered in the appropriate language and context.

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201. Michael Grabell, *What Happens If Workers Cutting Up the Nation's Meat Get Sick?*, PROPUBLICA (Mar. 28, 2020, 1:25 PM), <https://www.propublica.org/article/what-happens-if-workers-cutting-up-the-nations-meat-get-sick>.

202. *Id.*

Recommended content is derived in part from federal guidance<sup>203</sup> and should also include information on workers' rights. Out of respect for the workers, communication and training programs should be easy to understand, provided at the appropriate literacy level, and in the preferred language(s) spoken or read by the workers. These empowerment activities must be meaningful and coupled with a commitment to safety and non-retaliation by the industry. Given the history of the industry's lack of trustworthiness, engagement with community advocates and health workers is likely to prove far more effective.

### C. Government or Government-Industry Policy Implementation

#### 1. Provide No-Cost, Confidential Testing

Because of the history of worker mistreatment, testing conducted by the industry is not likely to engender trust. Instead, local public health officials should facilitate access to no-cost, rapid, and accurate testing both for surveillance purposes and for symptomatic workers. This must be paired with paid time off for those who test positive and their close contacts to facilitate worker participation. Testing programs are prudent: asymptomatic and pre-symptomatic COVID-19 positive workers will unknowingly pose a greater risk to co-workers and community members. Uninterrupted spread from these individuals can harm the well-being of the meat-processing facility, the local community, and potentially the nation's food supply.

For those with positive tests, contact tracing (*i.e.*, identifying person-to-person spread) should be done by state or local health departments (and not the employer), following CDC guidance.<sup>204</sup> Confidentiality in the process is paramount—public health departments are ethically, and often legally, bound not to disclose contact tracing information to anyone, including employers. Even the perception that the industry is misusing the information or intruding into private spaces will increase avoidance, which will lessen the chances of early intervention.

Confidentiality is a primary concern in public health, stemming from the values of professionalism, trust, and procedural justice, as well as from concerns for balancing individual privacy and community health.<sup>205</sup> Breaches undermine

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203. *COVID-19 Control and Prevention*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/covid-19/controlprevention.html> (last visited Aug. 3, 2020). *See also Interim Guidance*, *supra* note 128.

204. *Case Investigation and Contact Tracing: Part of a Multipronged Approach to Fight the COVID-19 Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html> (last visited Oct. 21, 2020).

205. Daniel Wartenberg & W. Douglas Thompson, *Privacy Versus Public Health: The Impact of Current Confidentiality Rules*, 100 J. PUB. HEALTH 407, 410 (2010).

trust, leading to understandable refusals to provide personal information that is essential to reducing outbreaks.<sup>206</sup>

## 2. Ensure Adequate Housing and Quarantine or Isolation Spaces

The industry should work with government and other private actors to acquire appropriate housing options for workers who cannot adequately quarantine or isolate in their typical housing.<sup>207</sup> This is critical for reducing risks to workers and their communities and should be free to the workers. A commitment to reciprocity underlies the industry's responsibility here—both because the industry bears some responsibility for its workers' financial insecurity that contributes to crowded housing and because the workers continue to assume substantial risk of infection in the workplace during the pandemic.

## 3. Partner with Public Health Departments and Community Organizations

Community organizations and advocates understand how to best mobilize information where workers and their families live. These groups and individuals have pre-existing credibility with the community and are viewed as trustworthy sources of information and resources. The effectiveness of community advocates in bolstering the IPC measures and promoting worker and community health is well demonstrated.<sup>208</sup> These resources are also essential for addressing vaccine-related questions and concerns.<sup>209</sup>

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206. Marianne Udow-Phillips & Paula M. Lantz, *Trust in Public Health Is Essential amid the Covid-19 Pandemic*, 15 J. HOSP. MED. 431, 432 (2020); Wartenberg & Thompson, *supra* note 205, at 407.

207. Some private organizations did collaborate with industry during outbreaks. *See, e.g., AHLA's Hospitality for Hope Initiative*, AM. HOTEL & LODGING ASS'N, <https://www.ahla.com/ahlas-hospitality-hope-initiative> (last visited Apr. 22, 2021); David Oliver, *Most People Aren't Staying at Hotels During Coronavirus, but Rooms Are Getting Filled Anyway*, USA TODAY (Apr. 17, 2020, 9:00 AM), <https://www.usatoday.com/story/travel/hotels/2020/04/17/coronavirus-travel-how-hotels-like-marriott-hilton-filling-rooms/2990669001/>.

208. Lloyd Michener et al., *Engaging with Communities—Lessons (Re)Learned From COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 16, 2020), [https://www.cdc.gov/pcd/issues/2020/20\\_0250.htm](https://www.cdc.gov/pcd/issues/2020/20_0250.htm); Amanda L. Kobokovich et al., *Supporting Social Distancing for COVID-19 Mitigation Through Community-Based Volunteer Networks*, 110 AM. J. PUB. HEALTH 1167, 1168 (2020).

209. *See, e.g., Rolfe Winkler & Daniela Hernandez, Advocates Fight Covid-19 Vaccine Concerns Among Agricultural Workers*, WALL ST. J. (Mar. 9, 2021), <https://www.wsj.com/articles/advocates-fight-covid-19-vaccine-concerns-among-agricultural-workers-11615285801>.

#### 4. Provide Transportation Alternatives

Meat processing workers often carpool to and from work, presenting another opportunity for virus transmission.<sup>210</sup> Facilities should provide safer alternative transportation options (such as small numbers, required masks, and enhanced ventilation in the vehicle where possible). While only a minority of facilities have done so, it is justified by prudential and ethical factors during the pandemic.<sup>211</sup>

#### 5. Provide Healthcare Coverage for Those Who Develop COVID-19

Health care access is a basic human right; even as the national debate about how to provide basic access to health care continues, access to care for those with COVID-19 is a pressing need to reduce unnecessary illness and death. The responsibility for providing coverage for workers should be shared among the meat processing industry, the government, and other stakeholders who most benefit from continued meat processing operations. Caring for workers and their families that fall ill after risking their health and lives to maintain production is a matter of equity, reciprocity, and respect for these essential workers. Government solutions to improve basic health care access for all, regardless of immigration or socioeconomic status, is critical to the nation's health overall and to creating an equitable baseline to reduce the disproportionate morbidity and mortality in this and future pandemics and epidemics.

#### 6. Legal Mandates for Worker Safety

Every level of government should prioritize worker safety during the pandemic and address the structural drivers of disparate risks to workers. Innovative policy development is needed at the federal, state, and local levels. Of course, OSHA should exercise its authority to issue ETSs and robustly enforce the OSH Act, and the federal government should enhance PPE production. These are necessary but not sufficient actions to ameliorate the dangers and harms to workers in essential industries. Multilevel, innovative policy responses are needed.<sup>212</sup> State and local governments can supplement federal efforts and also create solutions that benefit from existing relationships and an understanding of regional needs.<sup>213</sup> However, caution is needed to avoid

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210. Luke Runyon, *Meatpacking Plant Working Conditions Stoke Spread of Coronavirus*, NPR (Apr. 19, 2020, 5:06 PM), <https://www.npr.org/2020/04/19/838195049/meatpacking-plant-working-conditions-stoke-coronavirus-spread>.

211. Waltenburg et al., *supra* note 9, at 890.

212. See, e.g., Lauren Lanahan & Maryann P. Feldman, *Multilevel Innovation Policy Mix: A Closer Look at State Policies that Augment the Federal SBIR Program*, 44 RSCH. POL'Y 1387 (2015).

213. See generally Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

harm-inducing policies, For example, state and local policy may fail to protect workers because of the tyranny of local majorities, which can reinforce subrogation of the less powerful, or because of a susceptibility to economic competition.<sup>214</sup>

Legally required and enforced worker protections are needed as well as revisions to workers' compensation laws to cover workplace acquired COVID-19 related illnesses and death. Other legal enactments, such as minimum wage increases and requiring employers to provide paid time off, could help better position workers to avoid workplace injury and illness in the future. Deference to the industry at the expense of workers is both unethical and short sighted. A principled culture of compliance in the workplace, enhanced by robust enforcement of worker safety laws, is a first step toward treating meat processing workers as essential. Comprehensive policy changes based in equity to ensure living wages, sick time, and health care access are ultimately needed to prevent the ravages of the next pandemic on communities of color.

## V. CONCLUSION

The COVID-19 pandemic has highlighted and exacerbated existing health injustices. People who are Latino/Latinx, Black, Indigenous, or members of other minority groups have disproportionately paid with their very lives. The pandemic has also exposed the complex interdependence of worker health and well-being, community health, and economic security. Industries like meat processing facilities—with congregate and high-density workplaces staffed by workers who are already disadvantaged by structural discrimination—must reckon with decades of subrogation and exploitation of workers. During this pandemic, the industry has pushed that exploitation to a point of no return. Policies to protect workers need a reset to an orientation of solidarity, mutual respect, justice, and equity.<sup>215</sup> It is time for the industry that has so often profited at the expense of worker safety to sacrifice their fair share. The ethical underpinnings here are applicable to other workers' who have been relegated to the sidelines in other essential industries, such as agriculture, retail and public service, and long-term care. Many groups of non-professional essential workers (e.g., meat processing workers, certified nursing assistants, and agricultural workers) were already positioned for health harms before the pandemic due to workplace conditions, poor access to care, and poor health outcomes. Making

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214. See generally Frederick J. Boehmke & Richard Witmer, *Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion*, 57 POL. RSCH. Q. 39 (2004).

215. George A. Gellert, *Ethical Imperatives Critical to Effective Disease Control in the Coronavirus Pandemic: Recognition of Global Health Interdependence as a Driver of Health and Social Equity*, ONLINE J. HEALTH ETHICS, 2020, at 5, 6.

ethical decisions about workplace protections during a pandemic should account for those heightened risks and existing disadvantages.

## VI. AFTERWARD

As this Article goes to press, plant outbreaks continue,<sup>216</sup> and a report from the National Academies estimates that up to eight percent of all COVID-19 cases in the United States are linked to meat processing plants.<sup>217</sup> Evidence continues to emerge around the pressures on essential workers and the heightened risks for those who are immigrants or members of racial or ethnic minority groups. A new qualitative study of Latino/Latinx individuals hospitalized from COVID-19 identified many of the themes discussed in this Article, including continuing to work despite health risks and with COVID-19 symptoms because of a lack of paid time off or sick days as well as financial, food, and housing insecurity.<sup>218</sup> Participants also were reluctant to seek medical care because of health care costs, lack of insurance, and fears of immigration enforcement and deportation.<sup>219</sup> And more actions against meat processing companies are working their way through the courts.<sup>220</sup>

There are also hopeful signs that the orientation of the federal government has shifted toward prioritizing access to health care,<sup>221</sup> a commitment to equity,<sup>222</sup> and worker protection under the Biden administration.<sup>223</sup> An executive order issued January 21, 2021, began by describing the health and

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216. See e.g., Leah Douglas & Georgia Gee, *A COVID Outbreak at a California Meatpacking Plant Started a Year Ago—and Never Went Away*, MOTHER JONES (Mar. 13, 2021), <https://www.motherjones.com/food/2021/03/a-covid-outbreak-at-a-california-meatpacking-plant-started-a-year-ago-and-never-went-away/>.

217. Charles A. Taylor et al., *Livestock Plants and COVID-19 Transmission*, 117 PROC. NAT'L ACAD. SCI. 31706, 31706 (2020).

218. See generally Lilia Cervantes et al., *Experiences of Latinx Individuals Hospitalized for COVID-19: A Qualitative Study*, 4 JAMA NETWORK OPEN e210684 (2021).

219. *Id.* at e210694.

220. See e.g., *Fernandez v. Tyson Foods*, No. 20-CV-2079-LRR, 2020 U.S. Dist. LEXIS 246104 (N.D. Iowa Dec. 28, 2020) (alleging negligent misrepresentation in claims about COVID-19 protections to induce workers to remain on-site and negligence in failing to implement reasonable protections, leading to the death).

221. See e.g., *Executive Order on Improving and Expanding Access to Care and Treatment for COVID-19*, THE WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-improving-and-expanding-access-to-care-and-treatments-for-covid-19/>.

222. See e.g., *Executive Order on Ensuring an Equitable Pandemic Response and Recovery*, THE WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-ensuring-an-equitable-pandemic-response-and-recovery/>.

223. See e.g., *Executive Order on Protecting Worker Health and Safety*, THE WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>.

safety of workers as a “national priority and moral imperative.”<sup>224</sup> The order directed OSHA to consider ETSS, review enforcement efforts, and launch a national program to focus on enforcement.<sup>225</sup> On February 1, 2021, the House Select Committee on the Coronavirus Crisis initiated an investigation of the meat processing industry’s handling of the worker protections during the pandemic.<sup>226</sup> The Biden administration halted line speed waivers and the Office of the Inspector General in the Department of Labor issued a report critical of OSHA’s handling of safety concerns and lack of inspections in the last year despite a fifty percent increase in reports of worker safety concerns.<sup>227</sup> On March 12, 2021, OSHA created a new National Emphasis Program that will focus inspections and investigations on establishments with increased COVID-19 risks, where complaints and referrals are high.<sup>228</sup> Although an ETS has not yet been issued, this administration appears committed to worker safety. In the end, the existing structural inequities and worker exploitation made the industry less agile during the pandemic. Long term commitments to workers’ rights with the burden on industry to adopt those commitments is the only way to ethically and practically prepare for the next pandemic or public health crisis.

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224. *Id.*

225. *Id.*

226. Letter from James e. Clyburn, Chairman, Select Subcomm. on Coronavirus Crisis, to James Frederick, Deputy Assistant Sec’y of Lab. for Occupational Safety & Health, Occupational Safety & Health Admin. (Feb. 1, 2021), [https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021-02-01.Clyburn%20to%20OSHA%20re%20Meatpacking%20Investigation\\_.pdf](https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021-02-01.Clyburn%20to%20OSHA%20re%20Meatpacking%20Investigation_.pdf).

227. *See generally* OFF. OF INSPECTOR GEN., DEP’T OF LAB., REP. NO. 19-21-003-10-105, COVID-19: INCREASED WORKSITE COMPLAINTS AND REDUCED OSHA INSPECTIONS LEAVE U.S. WORKERS’ SAFETY AT INCREASED RISK (2021).

228. OCCUPATIONAL SAFETY & HEALTH ADMIN., DEP’T OF LAB., DIRECTIVE NO. DIR 2021-01 (CPL-03), NATIONAL EMPHASIS PROGRAM – CORONAVIRUS DISEASE 2019 (COVID-19) (2021).



